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THE  
PACIFIC REPORTER,

VOLUME 10,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

California, Colorado, Kansas, Oregon, Nevada, Arizona,  
Idaho, Montana, Washington, Wyoming,  
Utah, and New Mexico.

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MARCH 25—JUNE 3, 1886.

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## COURT RULE—NEVADA.

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CARSON CITY, NEVADA, May 8, 1886.

The "Territorial Enterprise" declining to continue the publication of the decisions of the Supreme Court, the following order was this day made:

Ordered, that the 15 days' time within which petitions for rehearing shall be presented, shall commence to run upon publication of the opinions and decisions in the "Pacific Reporter," a weekly legal periodical, published at the city of St. Paul, state of Minnesota.

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THE  
Pacific Reporter.  
VOLUME X.

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*SUPREME COURT OF KANSAS.*

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(35 Kan. 36)

CARROLL v. WALL.

Filed March 5, 1886.

**MUNICIPAL CORPORATION—OFFICERS—CONFIRMATION—VOTE OF MAYOR OF CITY OF SECOND CLASS.**

The mayor of a city of the second class is authorized to give a casting vote upon the confirmation of an officer appointed by him, where the council is equally divided on the question. HORTON, C. J., dissenting.

Original proceedings in the nature of *quo warranto*.

*Goodin & Keplinger, N. Cree, and W. S. Carroll*, for plaintiff.

*Sherry & Harlow, T. P. Fenlon, and E. J. Wall*, for defendant.

JOHNSTON, J. This is a controversy concerning the title to the office of city attorney of the city of Kansas, which is claimed by William S. Carroll by virtue of having been elected thereto at the regular election in April, 1883. He was then chosen for a term of two years, and until his successor was elected and qualified. On March 11, 1885, an act amendatory of the law relating to cities of the second class went into effect, which provided that the city attorney should be appointed by the mayor with the consent of the council. Chapter 99, Laws 1885. In pursuance of this law, and on the thirteenth day of April, 1885, the mayor of the city of Kansas nominated the defendant, E. J. Wall, as city attorney, and submitted his name for confirmation to the council, which was then in session, with all the members present. A vote was taken thereon, upon which the council divided equally, and thereupon the mayor gave a casting vote in favor of confirmation. The defendant was immediately installed in the office, and now holds and claims the same by virtue of the appointment and confirmation thus made. The question to be decided

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is whether the mayor has a right to give a casting vote upon the confirmation of an appointment when there is a tie, and it is purely one of statutory construction. Section 21 of the statute governing cities of the second class gives the mayor a casting vote in these words: "The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other." Chapter 19, Comp. Laws 1879. This is a prospective provision, which is broad and general in its terms, and the power therein conferred on the mayor to give a casting vote, if not restricted by other provisions of the statute, extends to a vote upon every question where the council is equally divided.

The plaintiff contends that there are exceptions, and that the provision with respect to appointments is one of them. The language of that provision is:

"The mayor shall appoint, by and with the consent of the council, a city marshal, a city clerk, a city attorney, a city assessor, and may appoint an assistant marshal, a city engineer, a street commissioner, and such policemen and other officers as may be necessary." Section 13.

There is no express denial in this provision of the power conferred by section 21 upon the mayor to give a casting vote when the council is equally divided, nor do we think that such an exception arises by implication. Upon certain questions which come before the council so many votes are required that a tie vote cannot arise, and the mayor is thus precluded from giving a casting vote. Counsel for plaintiff call these exceptions to the rule prescribed in section 21, and liken them to the provision enacting that appointments shall be made with the consent of the council. In section 19 of the act it is provided that the council, by a vote of the majority of all the members elect, may for cause remove certain officers; and in section 42 of the same act it is said that "no ordinance providing for the borrowing of moneys, levying taxes, or appropriating money shall be of any validity unless a majority of all the councilmen elect shall vote for such ordinance." In these provisions the legislature has clearly taken the questions referred to, outside of that provision of section 21 which gives the mayor a casting vote. But it made no such requirement respecting confirmations. If it had been the intention to have required a majority of the council to consent to or confirm an appointment, it would have been easy to have so said, and in expressing its purpose the legislature would likely have used the same or similar language as was employed in the provisions above quoted. That the legislature explicitly required a majority in those cases, and not in the one respecting appointments, argues strongly against the position assumed by the plaintiff.

It is contended that as it is provided that the council shall consent to and confirm the appointment, it necessarily means that the consent must be given by the council acting as a separate and independent body. This can hardly be, as the council is not author-

ized to act independently of the mayor. They cannot withdraw from or exclude him from their council meetings. The statute provides that when the members meet as a council the mayor shall be present and preside; and the mere fact that the legislature stated that the council shall confirm, when read in connection with other provisions of the act, does not manifest an intention to exclude the mayor from giving a casting vote. In the sections conferring power upon the mayor and council, the usual, and almost the only, form of expression employed is that "the council shall have power" to do this, that, and the other, making no mention of the mayor, and yet no one would argue that it was intended that the council should act apart from and independently of the mayor; and it would also be readily conceded that if the council should divide equally upon the exercise of many of the powers conferred the mayor would have a deciding vote. The provision that the council shall confirm an appointment is no more restrictive of the power given in section 21 than other provisions of the act where the council alone are mentioned. The power conferred upon the mayor by that section cannot be held to have been taken away or restricted by other provisions of the statute, unless they are clear and unambiguous to that effect.

The other matters brought to our attention by the plaintiff are not material, and therefore the relief which he asks for must be denied.

Judgment for costs will be given in favor of defendant.

VALENTINE, J., concurs.

HORTON, C. J., (*dissenting.*) I do not think it good policy for the mayor to be permitted to give the casting vote upon the confirmation of his own nominations to the city council; and unless the language of the statute imperatively demands such a construction, the mayor should have no vote in the confirmation of his appointments. I think the words that "the mayor shall appoint, by and with the consent of the city council," should be construed to mean that while the mayor may appoint the council *alone* shall confirm, and that it was not the intention of the legislature to permit the mayor to control or participate in the confirmation by giving him the casting vote.

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(34 Kan. 714)

STATE *ex rel.* LEWIS, Co. Atty., etc., v. EGGLESTON and others.

Filed March 5, 1886.

1. COUNTIES—PETITION FOR REMOVAL OF COUNTY-SEAT—STRIKING OFF NAMES.

Where a petition is presented to the board of county commissioners of a county for the removal and relocation of a county-seat, the commissioners should strike the names of all persons therefrom who make application to have their names stricken off before final action is taken upon the petition. If this is not done, the signers of the petition who asked their names to be stricken off should not be counted by the board of commissioners in determining the number of petitioners for the removal and relocation of the county-seat.

**2. SAME—NUMBER OF PETITIONERS INSUFFICIENT—ENJOINING COMMISSIONERS FROM CANVASSING VOTES.**

Where a petition is presented to the board of county commissioners for the removal and relocation of a county-seat, and, after disregarding all of the ineligible petitioners and the signers who asked their names to be stricken off before final action was taken thereon, the petition contains less than three-fifths of the legal electors of the county whose names appear upon the last assessment rolls of the county, such petition is wholly insufficient upon which to order an election for the relocation of the county-seat; and the county attorney of the county in which the petition is presented may, in the name of the state, maintain an action to enjoin the board of county commissioners from canvassing the votes cast at and returned from the several precincts of the county at an election ordered upon such a petition.

**3. SAME—UNDERTAKING FOR INJUNCTION.**

A party applying for a temporary injunction need not execute the undertaking. It is sufficient if he furnish one executed by sufficient securities.

**4. SAME—INJUNCTION SUIT BY COUNTY ATTORNEY IN NAME OF STATE.**

Where an injunction suit is brought by the county attorney of a county in the name of the state, and a temporary injunction is allowed at the commencement of the proceeding, an undertaking furnished by the plaintiff, but signed only by sufficient securities, is valid and binding.

**5. SAME—AMOUNT OF BOND—PRESUMPTION.**

Where the probate judge of a county allows a temporary injunction, but does not expressly state in his written order the amount of the undertaking to be given, but the undertaking, which is given and accepted on the day of the allowance of the order, recites upon its face that the injunction was granted upon the condition that the plaintiff give a bond to the defendants in the sum of \$500, it must be assumed, in the absence of any other showing, that the probate judge fixed the amount of the undertaking, and that the bond was given and approved in pursuance of his order.

**Error from Pratt county.**

On August 19, 1880, an election for the location of the county-seat of Pratt county was held, and at such election the county-seat was located at Iuka. On August 13, 1885, a petition for the relocation of the county-seat of the county was presented to the board of county commissioners asking for an election for the relocation of the county-seat. The number of names of voters of Pratt county appearing upon the last assessment rolls for the cities and townships of the county is from 1,600 to 1,900. The petition presented purported to contain 1,581 names, and the city of Pratt was named as the place to which the county-seat was to be removed. Upon the presentation of the petition to the county board the board examined the same, decided it was sufficient, and ordered an election, in accordance with the prayer thereof, to be held September 21, 1885. In pursuance of this order notice of the election was given.

On September 1, 1885, however, the county commissioners again considered the petition first presented August 13th, and made a new order, calling an election for the relocation of the county-seat of Pratt county and the removal of the same from Iuka to the city of Pratt, to be held October 1, 1885. On September 7, 1885, the state of Kansas, on the relation of D. C. Lewis, county attorney of Pratt county, commenced an action in the district court of the county against Arthur J. Eggleston, Ebenezer N. Watson, and Christian Howald, the county commissioners of the county, and also against the various persons composing the boards of registration of the dif-

ferent precincts of the county, to restrain them, as registration boards of their respective townships, from performing their duties as such boards, and to restrain the board of county commissioners from canvassing the returns of the election to be held on October 1, 1885, upon the question of the relocation of the county-seat. The petition alleged, among other things, that of the 1,581 persons whose names appeared on the pretended petition not more than one-half really signed the petition, or authorized any person to sign the same for them; that 466 of such persons subsequent to the alleged signing of the same had withdrawn their names from the petition; that the names of 24 of such persons appeared upon the pretended petition twice; that 488 of such persons were not legal petitioners of the county of Pratt; that, in fact, less than one-third of the number of legal electors of Pratt county whose names appeared upon the last assessment rolls of the county had signed the petition; that 170 of such persons were induced to sign the petition by false and fraudulent representations made to some of the signers by Christian Howald, one of the county commissioners, to the effect that the pretended petition was a road petition,—that the same was a petition for a new township; and to others the statement was made that it was a petition to relocate the county-seat, but other places than Iuka and Pratt City could be voted for at such election. The petition also stated, among other things, that on August 20, 1885, a petition signed by 1,236 legal electors whose names appeared upon the last assessment rolls of the county of Pratt was presented to the board of county commissioners of that county, in regular session, praying that an election be called for the relocation of the county-seat, and designating the city of Saratoga as the place to be voted for; that the said petition contained the names of more than three-fifths of the legal electors of the county of Pratt whose names appeared upon the last assessment rolls aforesaid; and that the board of county commissioners refused to act upon the petition.

On the day the action was commenced, the judge of the district court of Pratt county being absent from the county, the probate judge of that county granted a temporary injunction, as prayed for in the petition of the relator, with which the defendants were served. Upon the same day the following undertaking in the case was given and approved:

"IN THE DISTRICT COURT OF PRATT COUNTY, KANSAS.

*"The State of Kansas ex rel.,"* etc., *"Plaintiff,* v. *Arthur J. Eggleston et al., Defendants.*

"BOND.

"Whereas, an action has been commenced in the district court aforesaid, wherein the state of Kansas on the relation of D. C. Lewis, county attorney of Pratt county, Kansas, is plaintiff, and Arthur J. Eggleston and others are defendants, and an injunction granted therein upon the plaintiff giving a bond to the defendants in the sum of five hundred dollars, to be approved

by the clerk of the court, now we, the undersigned, undertake in the sum of five hundred dollars to secure the party injured in the damages he may sustain if it be finally decided that the injunction ought not to have been granted.

*"Dated this seventh day of September, A. D. 1885.*

**"J. H. D. ROSAN.  
JAMES TEMPLE."**

**"This bond approved.**

**"J. W. ELLIS, Clerk."**

On September 8, 1885, the defendant served notice on the relator of a motion to vacate the temporary order of injunction, and that the motion would be heard before the district judge at Great Bend on September 12, 1885. On that day the parties to the action visited Great Bend, Barton county, for the purpose of disposing of the motion, but found the district judge absent. Thereupon the defendants served notice upon the relator that the motion to dissolve the injunction would be heard before the district judge at Lyons on the same day, and the district judge modified the order of injunction by vacating the same as to all of the defendants except the board of county commissioners. No exception was taken to this order. The further hearing of the motion as to the other defendants was continued until September 18, 1885, to be heard at Iuka, in Pratt county. On September 17, 1885, the relator filed the following amendment to his petition, verified by his own oath:

"And now comes the said relator, and, by leave of the court just had and obtained, files this an additional statement of facts in amendment of the petition now on file in this cause, and alleges that of the 1,581 names appearing on said pretended petition mentioned and referred to in said petition on file in this cause, and on which said election called by said Eggleston and Howald on the first of September, 1885, was based, 466 of the same requested the board of county commissioners of Pratt county not to consider their signatures in their consideration of said pretended petition, and before the first day of September, 1885, withdrew their names from said pretended petition, of which said county commissioners had due notice before said first day of September, 1885,—a list of said withdrawn names is hereto attached, marked 'A,' and made a part hereof, [list omitted;] that of the 1,581 names appearing on said pretended petition as aforesaid, 24 of the same appear thereto twice, a list of which is hereto attached, marked, 'B,' and made a part hereof, [list omitted;] that of the 1,581 names appearing on said pretended petition as aforesaid, 31 of same are now, and were when said pretended petition was presented to said board of county commissioners, non-residents of said Pratt county, a list of which is hereto attached, marked 'C,' and made a part hereof, [list omitted;] that of the 1,581 names appearing on said pretended petition as aforesaid, 134 of same were signed to said pretended petition under false and fraudulent representations, as appears by the 134 affidavits attached together and filed herewith as Exhibit D, and hereby made a part hereof, [affidavits omitted;] that of the 1,581 names appearing on said pretended petition as aforesaid, 487 of same were not eligible petitioners, as their names do not appear on the last assessment rolls of the several township and city assessors for said Pratt county, a list of which is hereto attached, marked 'E,' and made a part hereof, [list omitted;] that of the 1,581 names appearing on said pretended petition as aforesaid, 181 never signed the same, or any part of

same, but were put on a detached piece of paper, which was afterwards attached to said pretended petition, a list of which is hereto attached, marked 'F,' and made a part hereof, [list omitted;] that of the list above named 216 of said names are common to two or more of same, leaving not more than 545 of the names on said pretended petition that are, or were when the same was presented as aforesaid, eligible petitioners, and leaving said pretended petition with not more than 545 eligible petitioners; that there are between 1,600 and 1,900 qualified electors whose names appear on the last assessment rolls of the several township and city assessors for the said county of Pratt. Wherefore plaintiff asks that this honorable court will grant the prayers of said petition filed herein."

On said September 18th the relator filed a motion before the district judge to reinstate the injunction as to the trustees and justices of the peace, which motion was overruled, and the relator excepted. The further hearing of the motion was continued until October 5, 1885, to be heard at Great Bend, and on that day the injunction was wholly vacated and set aside. The relator excepted, and, for the purpose of having the orders of the district judge reviewed in this court upon petition in error, the judge fixed the time within which the petition in error should be filed. Within that time the petition in error was filed.

*S. B. Bradford*, Atty. Gen., *Gillett & Whitelaw*, *E. A. Austin*, *H. P. Cooper*, and *D. C. Lewis*, Co. Atty., for plaintiff in error.

*Leland J. Webb*, for defendant in error.

**HORROR, C. J.** The question for our determination is whether the temporary injunction granted by the probate judge of Pratt county, on September 7, 1885, enjoining the county commissioners of that county from canvassing the vote polled on October 1, 1885, upon the proposition for the relocation of the county-seat of that county, shall be continued in full force until the action can be tried and determined. The order calling the election was made September 1, 1885. The statute requires 30 days' notice of the election. Section 6, c. 26, Comp. Laws 1879. It is claimed that although notices of the election were posted September 1st, no legal notice of the election could have been given, as there was not sufficient time so to do. It is settled in this state that where any particular number of days, not expressed by *clear days*, is prescribed, the rule in regard to the computation of time is not to exclude both the day on which the notice is served and the day on which the act is to be performed, but to exclude the one and include the other. Section 722, c. 80, Comp. Laws 1879. Following this rule, 30 days' notice was given. This was sufficient. *English v. Williamson*, 34 Kan. —; S. C. 8 Pac. Rep. 214.

It is next claimed that no sufficient petition was presented to the board of county commissioners under the provisions of section 1, c. 91, Sess. Laws 1883, which, among other things, provides:

"In all cases where the county-seat of any county in this state has been or shall hereafter be located by a vote of the electors of such county, \* \* \* the board of county commissioners, upon the petition of three-fifths of the

legal electors of such county, shall order an election for the relocation of the county-seat."

The last assessment rolls of the several township and city assessors of Pratt county contain the names of from 1,600 to 1,900 legal electors. The petition presented purported to contain 1,581 names. If the names of the persons who requested the commissioners to withdraw their names from the petition, and the names of the ineligible petitioners, had been stricken off the petition before it was finally acted upon, or if the names of such persons had been disregarded, the petition would not have contained the names of sufficient petitioners; that is, there would not have been upon the petition three-fifths of the legal electors of the county whose names appeared upon the last assessment rolls of that county. If the district judge did not vacate the injunction upon the ground that the probate judge had no authority in this class of cases to issue an injunction, it is probable that he vacated the injunction upon the theory that the county board had no power to strike from the petition the name of any one who had signed the same, although requested so to do by the signer. The purpose of the petition prescribed by the statute is to enable the county board to determine what the will of the people is in that regard, and whether the number of legal electors required by the statute are, at the time of final action thereon, in favor of calling the election. Of course, ineligible petitioners ought not to be counted; and we think the county board, at any time before taking final action upon such petition, upon the request of any person who has signed the same, may determine not to regard such person as a petitioner, and may have his name stricken off the petition, or, if not stricken off, may regard him as not having signed the same. The legislature intended that no election should be ordered for a relocation of a county-seat, in cases like the present, unless a number of the legal electors of the county, equal to three-fifths of the number of legal electors who were assessable and had been assessed at the last assessment, should petition for such an election. If any such elector has by false representations, or through a misapprehension of the facts, been induced to sign such petition, he ought to be permitted to have his name stricken from the petition, if his application therefor is made to the county board prior to final action upon the petition. The board of county commissioners of Pratt county evidently mistook their duty in this respect, and it is only just to them and the people of their county that they have an opportunity to re-examine the petition and erase therefrom the names of all the signers who made such a request, and to otherwise purge the petition of ineligible petitioners.

We do not assent to the view that the finding of the board is so conclusive as to be beyond attack by this proceeding, which was commenced prior to the holding of the election. *Commissioners v. Brewer*, 9 Kan. 318; *Gillett v. Lyon Co.* 18 Kan. 410; *Wabaunsee*

*Co. v. Muhlenbacker*, Id. 129; *Oliphant v. Atchison Co.*, Id. 386; *Welsford v. Weidlein*, 23 Kan. 601; *Benton v. Nason*, 26 Kan. 662; *Fox v. San Mateo Co.*, 49 Cal. 563. We have examined the decisions cited, holding that the determination of the county board in such cases is conclusive until reversed or set aside upon appeal or by writ of error, and also the decision that the county board cannot comply with the request of the signers of petitions or remonstrances asking their names to be stricken off. The former decisions are contrary to the adjudications of this court, and the reasoning of the latter decision is not satisfactory. It is true that county-seat contests are attended with great bitterness, and charges and counter-charges of unfair practices and fraud are more or less bandied about; but we cannot perceive that the peace of the community can be promoted by the granting of an election for the relocation of the county-seat upon an insufficient petition, or that there will be any increase in the bitterness among the people if the signers of petitions are permitted to have their names stricken off, where their signatures have been procured by fraud or through a misapprehension of facts.

It is further claimed that the injunction granted September 7th has and can have no operation, because the state can give no bond; and if she could give bond, she would not be suable on it; also because it is alleged that the probate judge did not fix the amount of the undertaking.

To support the first proposition the case of *Com. v. Franklin Canal Co.*, 21 Pa. St. 117, is cited as decisive. The Pennsylvania statute provides that "no injunction shall be issued by any court or judge until the party applying for the same shall have given bond with sufficient sureties." The statute of this state reads: "No injunction \* \* \* shall operate until the party obtaining the same shall give an undertaking, executed by one or more sufficient securities." Under the Pennsylvania statute the party applying for the injunction must give or *execute* the bond; under the Kansas statute the party obtaining the injunction may give or *furnish* the bond, with one of more sufficient securities, but need not execute it. Even, however, if it be assumed that the Pennsylvania statute regarding injunctions is exactly similar to ours, yet, as in this state, all obligations are several as well as joint, we think that where an injunction suit is brought by the state, upon the relation of a proper party, a bond furnished by the plaintiff and executed by sufficient securities would be valid and legal.

Upon the other proposition, while the order allowing the injunction does not fix the amount of the undertaking, yet it appears from the face of the undertaking that the injunction was granted upon the condition that the plaintiff give a bond to the defendants in the sum of \$500, to be approved by the clerk of the court. This bond was given and approved on the same day that the order of injunction was allowed. Taking all the record before us, we think it sufficiently ap-

pears that the probate judge fixed the amount of the undertaking, and that the bond approved by the clerk of the court was given and accepted in pursuance thereof.

This is not an action brought under the provisions of article 7, c. 36, Comp. Laws 1879, for contesting county-seat elections; but is a suit brought against county and other officials, involving their official action and affecting the public interests. The petition alleges that there was no sufficient petition presented to the board of county commissioners, and that they acted wholly without any authority in ordering the election for the relocation of the county-seat of Pratt county; that they disregarded their duty in not striking off the petition the ineligible petitioners, and the names of the electors who applied to have their names stricken therefrom, before the election was ordered. The matters set up in the petition are of equitable cognizance, in which a remedy may be by injunction, and the attorney general or the county attorney of the county interested is the proper officer to prosecute this kind of an action. *Gossard v. Vaught*, 10 Kan. 162; *State v. Faulkner*, 20 Kan. 547; *State v. Marion Co.*, 21 Kan. 432; *Benton v. Nason*, *supra*.

Counsel for the county board rely with a great deal of confidence upon the cases of *Moore v. Hoisington*, 31 Ill. 243, and *Dickey v. Reed*, 78 Ill. 261, to establish the doctrine that the canvass of election returns cannot be interfered with by an injunction. Both of those cases were proceedings for contesting elections. This is not a proceeding to contest an election, but to restrain the canvass of a vote upon the ground that the petition presented to the county board for the election was wholly insufficient because of the fact that certain names were by the signers requested to be withdrawn, and that some of the names signed were the signatures of non-residents or other unauthorized persons. The petition alleges, in substance, that no election ought to have been ordered upon the petition, and that no election could have been legally held upon the petition, under the provisions of the statute.

As to the constitutionality of chapter 91, Sess. Laws 1883, see *State v. Butler Co.*, 31 Kan. 460; S. C. 2 Pac. Rep. 562. The vote polled October 1st cannot be canvassed or declared, or any valid proceedings taken thereon to change the county-seat of Pratt county, until the real facts of the case shall be ascertained upon the final trial, and the temporary injunction now in force shall have been legally dissolved; and the vote can never be canvassed or declared if it be finally determined that there was no valid or sufficient petition presented to the county board upon which to order an election. If upon the trial it shall be made to appear that after striking from the petition the non-eligible petitioners, and the names of all persons who asked their names to be stricken off the petition before final action was taken thereon, the petition contains less than three-fifths of the legal electors of the county on the last assessment rolls of the

county, the order for the election, and all proceedings thereunder, must fall. We are therefore led to the conclusion that the district judge erred in dissolving the temporary injunction, and the case will be remanded, with instructions to reverse such order, and to proceed further in accordance with the views herein expressed.

(All the justices concurring.)

(35 Kan. 31)

STATE v. HOLDEN and another.

Filed March 5, 1886.

**CRIMINAL LAW—APPEAL—ERRORS NOT SUFFICIENT TO JUSTIFY REVERSAL.**

Where the defendants in a criminal prosecution appeal to the supreme court, and ask for a reversal of the judgment of the court below for incompetency of their own counsel; neglect and failure on the part of the court below to protect their rights and interests; incompetency of the evidence against them; leading questions; erroneous and misleading instructions; insufficiency of the evidence for conviction, it being in part the evidence of an accomplice; the alleged hearing of a motion for a new trial in the absence of the defendants; and the refusal to grant a new trial on the ground of alleged newly-discovered evidence: *held*, under the circumstances of the case, that no material error was committed by the court below, and that the judgment cannot be reversed.

Appeal from Riley county.

*S. B. Bradford*, Atty. Gen., and *John E. Hessin*, for appellee.

*Sam Kimble*, and *Geo. C. Wilder*, for appellants.

VALENTINE, J. This was a criminal prosecution brought in the district court of Riley county, charging J. F. Holden and Hiram Hamilton with the larceny of a gelding and a mare, the property of Mahlon Parsons. The case was tried before the court and a jury, and the defendants were found guilty, and each sentenced to the penitentiary for the term of four years, and they now appeal to this court.

The principal grounds urged by the defendants for a reversal of the judgment of the court below are as follows: (1) Incompetency of the defendants' own counsel. (2) Neglect and failure on the part of the court to properly protect the rights and interests of the defendants. (3) Incompetency of much of the evidence introduced on the trial. (4) Leading questions asked by the attorney for the prosecution. (5) Erroneous and misleading instructions given by the court to the jury. (6) Insufficiency of the evidence for a conviction, it being in part the evidence of a supposed accomplice, and claimed to be unreasonable in itself, and not corroborated by the other evidence. (7) The hearing of the defendants' first motion for a new trial in the absence of the defendants. (8) The refusal of the new trial, notwithstanding the newly-discovered evidence.

While it is possible that a trial court, in the exercise of a sound judicial discretion, might properly, in some rare instance, grant a new trial on the ground of incompetency of a party's own counsel, yet we have never known or heard of a case where such a thing was done.

In the present case the defendants were defended by two counsel, one of whom was appointed by the trial court seven days before the trial was commenced, and the other appeared in the case on the trial without any showing as to how or by whom he was appointed or employed. Presumably, however, he was employed by the defendants themselves, or by their friends. But were the defendants' counsel incompetent, or did such counsel improperly manage the defendants' case? We cannot say that the record shows incompetency, or any such unwarranted neglect or mismanagement of the case as would justify a reversal of the judgment below. It is true that the record shows that some of the evidence of the prosecution, apparently incompetent, was permitted to go to the jury without any objection on the part of the defendants' counsel; and it is also true that many of the facts and circumstances proved by the prosecution, and which were apparently very damaging to the defendants' case, were left wholly uncontradicted and unexplained by any evidence introduced by the defendants' counsel; but it may also be true that all this was really in the interest of the defendants. It may be that objections to any of this evidence because of its apparent incompetency would have led to the proof of other facts which would have rendered it competent, or would have shown the defendants' guilt much more conclusively than it was shown by this apparently incompetent evidence; and it is possible, also, that an attempted denial or explanation of the facts proved by the prosecution, and not denied or explained by the defense, would have resulted in the proof of the defendants' guilt much more conclusively than in fact their guilt was proved. It is to be presumed that counsel knew best what evidence to object to, and whether it would be safe to attempt, by the introduction of other evidence, to deny or explain the facts proved by the prosecution. It is possible, indeed, that the fewer of the real facts tending to show guilt or innocence on the part of the defendants that were disclosed the better for the defendants. We do not think that the defendants are entitled to a reversal of the judgment of the court below because of any incompetency on the part of their counsel.

We have failed to perceive any such neglect or failure on the part of the court below to properly protect the rights and interests of the defendants as will require a reversal of its judgment. No material evidence prejudicial to the rights and interests of the defendants was erroneously permitted to go to the jury over the objections of the defendants, and no material evidence favorable to the rights or interests of the defendants was erroneously excluded over their objections. No leading question was erroneously permitted to be asked over the objections of the defendants. No exception was taken to any of the instructions given by the court to the jury; and, besides, we think the instructions that were given were all proper as correct propositions of law and applicable to the case, and no instruction was refused. Indeed, we not think that the court below committed ma-

terial error in any respect; and we think the defendants had a fair trial. A trial court is not bound to exclude evidence because it appears to be incompetent, where no objection is made by any of the parties; nor do we think that a trial court is bound to order that certain evidence shall be introduced, where no party is seeking to introduce the same. The defendants' present counsel, however, seem to think that the defendants were the especial wards of the court, and that the court was bound to know what was best for the protection of their rights and interests, and was bound to protect the same to the same extent that counsel ordinarily do. This is a mistake. The court sits merely as arbiter between contending parties. Of course the court ought never to sentence a convicted person criminally unless the court believes him to be guilty, nor should the prosecutor ever ask the court to do so unless the prosecutor also believes him to be guilty. We presume, however, in this case that both the court and the prosecutor believed at the time when the defendants were sentenced that they were guilty; and in all probability they were. At most we cannot say that they were not or are not guilty. We think we have sufficiently disposed of all the grounds for a reversal of the judgment of the court below down to the sixth.

As to the sixth ground for a reversal we would say that we think there was ample evidence to support the conviction of the defendants. The accomplice's testimony, if true, was enough, and it was corroborated in several particulars by the other evidence, and the instructions of the court below were correct and amply sufficient upon this subject.

It is claimed that the hearing of the defendants' first motion for a new trial was in the absence of the defendants; but there is no showing of this kind in the record, and hence it is unnecessary for us to express any opinion as to whether such a thing would be correct practice or not.

It is further claimed by the defendants that a new trial ought to have been granted on the ground of newly-discovered evidence. Now, it does not sufficiently appear that the evidence supposed to be newly-discovered evidence was really newly discovered; but if it was, still it does not appear that such evidence could not have been procured and introduced on the trial by the exercise of reasonable diligence. The offense for the commission of which the defendants were prosecuted was committed on the night of July 5, 1885. The defendants were arrested for such offense on September 1, 1885. One of the counsel for the defendants was appointed for them on September 7, 1885. When the other was appointed or employed is not shown. The trial was commenced and completed on September 14, 1885; and the defendants' first motion for a new trial, and all their affidavits relating to newly-discovered evidence and for a new trial, were filed on September 15, 1885; and all these affidavits were from persons whose testimony could have been procured and introduced on

the trial; and out of the nine persons whose affidavits were filed, four of them did in fact testify on the trial and in behalf of the defendants. In all probability these affiants were all present at the trial, except one, who was in jail, and his testimony could have been had if the defendants had desired the same. Other objections might be mentioned to the supposed newly-discovered evidence, but we do not think that it is necessary.

The judgment of the court below will be affirmed.  
(All the justices concurring.)

(35 Kan. 46)

### MESKIMEN and others v. DAY.

Filed March 5, 1886.

**1. DEED—EXECUTION—ACKNOWLEDGMENT—NOTARIAL SEAL.**

Where a notary public takes the acknowledgment of a deed in this state, he should authenticate the same with his notarial seal.

**2. SAME—RECORD—STATUTORY REQUIREMENTS AS TO WITNESSES AND ACKNOWLEDGMENT.**

Before a deed acknowledged in this state is entitled to be recorded, it must be proved or acknowledged and certified as prescribed by the statute.

**3. SAME—DEED WANTING NOTARIAL SEAL—EVIDENCE.**

The record of a deed filed in the office of a register of deeds, May 21, 1883, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of section 12, c. 87, Sess. Laws 1870; section 387a. Code, (Comp. Laws 1879.)

**4. EJECTMENT—COST—RECOVERY OF PART OF LAND.**

In an action for the recovery of 26 acres of real property, in which judgment is rendered in favor of the plaintiff for two acres thereof, the plaintiff is entitled to recover all his costs.

Error from Pottawatomie county.

Oliver Meskimen and Mary Meskimen brought their action against Moses Day, and alleged in their petition as follows:

"That the said plaintiffs have a legal estate in and are entitled to the possession of the following real estate situate in the county of Pottawatomie, state of Kansas, and described as follows, to-wit: The north-east quarter of the south-east quarter of section thirty-three, (33,) in township seven, (7,) of range eleven (11) east, containing forty acres of land; and that the defendant unlawfully keeps said plaintiffs out of the possession of the same. Wherefore the plaintiffs pray judgment against the defendant for the possession of said premises, and for such other and further relief as they may be entitled to."

The defendant filed his answer, alleging:

"Now comes the said defendant, and for answer to the petition of the plaintiffs says that the said plaintiffs have not, and had not at the commencement of this action, any legal or equitable estate in, nor are or were they or either of them entitled to the possession of, the following bounded and described part of the real estate described in the petition, in manner and form as therein set forth, to-wit: Beginning at the north-east corner of the south-east quarter of section thirty-three, (33,) in township seven (7) south, of range eleven (11) east, and running thence west ten (10) rods; thence south thirty-two (32) rods; thence west seventy (70) rods; thence south forty-eight (48) rods; thence east eighty rods; and thence north eighty rods,

to the place of beginning,—containing twenty-six acres of land, more or less, all in Pottawatomie county, state of Kansas; that the said defendant is and was the legal and equitable owner in fee-simple of all the real estate above described, and in the possession and entitled to the possession thereof; and that he disclaims all right, title, and interest in or to the residue of the real estate described in the petition, and did not and does not keep the plaintiffs out of the possession of the same.”

Trial had at the April term for 1884. Judgment for plaintiffs for two acres of the land, and that the defendant is entitled to twenty-four acres. The court ordered that each party pay the costs by him or them made, respectively. The plaintiffs excepted, and bring the case here.

*John T. Morton and Case & Curtis*, for plaintiff in error.

*D. V. Sprague*, for defendant in error.

HORTON, C. J. This was an action in the nature of ejectment, brought by Oliver and Mary Meskimen against Moses Day, to recover 40 acres of land. The defendant answered, claiming to be the legal owner of 26 of the 40 acres, and disclaiming all title or interest to the residue. Trial to the court without a jury. The court rendered judgment that the plaintiffs recover two acres of the land in controversy, and decided that the other twenty-four acres belonged to the defendant. Each party was adjudged to pay its own costs. Upon the trial the plaintiffs proved to the court that a deed, alleged to have been executed by one Wab-se-qua, a Pottawatomie Indian woman, on September 22, 1877, to Mary Meskimen, one of the plaintiffs, and delivered to Oliver Meskimen, the husband of Mary Meskimen, was, after the same had been filed for record in the office of the register of deeds of Pottawatomie county, lost, and that it was not then in the possession or under the control of either of the plaintiffs, and could not be found, although diligent search had been made therefor. Thereupon the plaintiffs offered in evidence the record of said deed from the office of the register of deeds of said county. The deed purported to have been acknowledged before one F. W. Kroenke, as notary public, but the certificate of acknowledgment was not authenticated with his official seal, or with any seal. The defendant objected to the record being read in evidence on account of the omission of the seal, and the objection was sustained. This ruling is complained of.

Section 5, c. 71, Comp. Laws 1879, reads: “Every notary shall provide a notarial seal, containing his name and place of residence, and he shall authenticate all his official acts, attestations, and instruments therewith.” Section 15 of said chapter 22 reads: “The certificate of proof or acknowledgment as aforesaid may be given under seal, or otherwise, according to the mode by which the courts or officers granting the same usually authenticate their official acts.” Chapter 22, Comp. Laws 1879, regulating the conveyances of real estate, provides that such conveyances may be acknowledged before a notary public; and section 19 of that act reads: “Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the

manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated." Section 387a of the Code (Comp. Laws 1879) provides that the books and records required by law to be kept by any register of deeds may be received in evidence in any court, and when any such record is of a paper or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original. Section 12, c. 87, Sess. Laws 1870.

The question, therefore, arises whether the certificate of acknowledgment of the notary public was sufficient, under the statute, without attaching his notarial seal thereto. We think not. As the deed was not properly authenticated, it was not entitled to be recorded. As it was not entitled to be recorded, the record thereof was not competent evidence. The lost deed purported to have been executed September 22, 1877, but it was not filed for record until May 21, 1883; therefore section 28, c. 22, Comp. Laws 1879, does not apply, because that statute took effect October 31, 1868. Neither has section 27 of said chapter 22 any application; and the decision of *Williams v. Hill*, 16 Kan. 23, to which we are referred, has reference only to copies of deeds which have been properly recorded. Since the decision in *Simpson v. Munde*, 3 Kan. 172, the statute regulating the conveyances of real estate has been materially changed. Section 13, c. 41, Comp. Laws 1862; section 19, c. 22, Comp. Laws 1879; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; *Wilkins v. Moore*, 20 Kan. 538. After the rejection of the record from the office of the register of deeds, the plaintiffs offered, and were allowed to prove, the contents of the lost deed. In this way the court became possessed of all its terms and conditions, and therefore we do not perceive that the ruling of the court rejecting the record of the deed was very material in the case.

The only remaining question is that of costs. These the court divided. In such cases as this costs follow the judgment, and plaintiffs were entitled to recover all their costs. The ruling of the trial court in this respect was erroneous. Section 589 of the Code reads:

"Where it is not otherwise provided by this and other statutes, costs shall be allowed, of course, to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." *City of Emporia v. Whittlesey*, 20 Kan. 17; *Smith v. Woodleaf*, 21 Kan. 717.

If the defendant had disclaimed as to all of the land in controversy, excepting the 24 acres adjudged to belong to him, of course he would have been entitled to recover costs. Section 590, Code.

The judgment below will be affirmed, excepting that the costs must be retaxed in accordance with the views herein expressed.

(All the justices concurring.)

## SUPREME COURT OF OREGON.

(13 Or. 214)

MAYS, Assignee, etc., v. FOSTER and others.

Filed February 8, 1886.

## CORPORATION—TRANSFER OF STOCK BY STOCKHOLDER—CONSTRUCTION OF SUCH TRANSFER.

The transfer by a stockholder to an individual of the former's stock is not to be construed as a transfer for the benefit of the company, unless there are particular circumstances to stamp it as such.

*F. P. Mays*, for respondent.

*R. Williams and J. K. Kelly*, for appellants.

LORD, J. The complaint filed by the plaintiff alleges, in substance, the incorporation of the Rockville, etc., Trading Company; the copartnership of the defendants; the assignment by said corporation, on January, 1881, of all its property, including the claim sued on, to the plaintiff; the delivery by said corporation to the defendants of 21,127 pounds of wool to be sold on commission; the sale of said wool for \$4,615.46, prior to December 15, 1880, by defendants; that the commissions, etc., all proper charges of defendants against said wool, were \$3,285.50; that the balance, \$1,329.96, had never been paid; and that said corporation had demanded said balance, but defendants refused and still refuse to pay the same. The answer of the defendants admits the incorporation of plaintiff's assignor, and the copartnership of defendants, but denies the assignment of said corporation to the plaintiff; denies that said corporation delivered to the defendants 21,127 pounds of wool, or any other or greater amount than 13,531 pounds; and alleges that they received 7,596 pounds of wool, being the balance from one T. S. Lang; sets up certain charges against the wool; and denies any indebtedness to the plaintiff. And as a separate defense, it is alleged that after the wool was received said Lang, who was indebted to the defendant John R. Foster in the sum of \$1,271.93, agreed with the defendants that they might retain from the proceeds of said wool the amount of his indebtedness to said Foster, and that this agreement was known to the corporation; and further alleges that prior to the sale of said wool, and while it was in the defendants' possession, said Lang and his wife transferred their stock in said corporation to said corporation, in consideration of which said corporation agreed with said Lang to pay to the defendants out of the proceeds of said wool the amount of Lang's debt to the defendant Foster; that after the sale the defendants did pay to the defendant Foster, with the consent of said corporation, the said sum of \$1,271.93, and only accounted to said corporation for the balance of the proceeds of said wool. The reply denied the new matter and the agreement set up in the answer. After the plaintiff had intro-

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duced some testimony, the following stipulation was made by the respective parties, in open court:

"That the wool alleged to have been shipped and delivered (part to John R. Foster and part to Foster & Robertson) was received by them, and that Foster & Robertson accounted for all the wool; but in doing so, and in rendering account of sales, they included therein as a charge against said company the note of T. S. Lang in favor of John Foster for \$1,271.93, which the defendants claim they had the right to do under an agreement with the company, but the plaintiff denies that any such agreement was made with the company."

By the terms of this stipulation there was left for trial but one question: Whether the defendants had the right to deduct from the proceeds of sales in their hands the amount of the note given by Lang to Foster. The jury found for the plaintiff.

The grounds of error alleged are in respect to certain instructions given at the request of the plaintiff, and in refusing to give certain others asked by the defendants. As all these instructions were based upon the supposed effect of certain evidence, it is necessary to give the substance of it to understand the point, or at least the main point, of contention. The stockholders of the corporation were T. S. Lang, Mary Lang, his wife, James A. Varney, John R. Poor, and Charles E. Poor. The capital stock was \$25,000, divided into 250 shares of \$100 each. Of these T. S. Lang had 1 share; his wife, 49 shares; Varney, 50 shares; and John R. Poor and his son Charles, 150 shares. All the stockholders were directors of the company at that time, and Lang was president of the board of directors and Varney the secretary. It appears by the record that some time in November, 1880, John R. Poor met T. S. Lang in the Dalles, and had a conversation with him at the Umatilla House about selling their stock in the corporation; and after a good deal of negotiation arrived at an understanding, subject to the approval of the other parties concerned, whereby the stock of the Langs, and it would seem also of Varney, was to be transferred to Sarah E. Poor, and in consideration thereof Poor was to procure the release of Lang from all his indebtedness to the company, and also to pay Foster the debt above referred to out of the proceeds of the wool in the hands of Foster & Robertson, the defendants. In pursuance of this understanding the parties all met at the house of Mr. Lang. All the directors of the company were present, but not holding a meeting as such, and the matter of the Langs selling out their stock was talked over; and the interview resulted in all present giving their consent to the agreement between Lang and Poor, which a day or two afterwards was carried into effect by an assignment of the stock to Sarah E. Poor. It is not claimed that the corporation acted in its corporate capacity in respect to this matter, nor that it received the stock, or any benefit resulting from it, unless John R. Poor be considered the corporation from the fact of owning the controlling interest in the corporation.

The plaintiff contended that the transaction was purely an individ-

ual matter between the parties, and in no way involving a corporate act, and in which the corporation was in no way concerned; and that its character as an individual transaction was not affected by the fact that some or all of the parties concerned were stockholders or directors of the corporation; nor by the further fact that the transaction on one side was to secure the transfer of stock by one individual to another individual. Upon this theory of the transaction, as it is disclosed by the evidence, the plaintiff based his instructions, which were given by the court and excepted to, and which, in our judgment, apply the correct principles of the law to the case, and require no further consideration, unless the instruction asked for by the defendants and refused by the court was error. This instruction sufficiently specifies the contention of the defendants, and is as follows:

"If T. F. Lang and his wife transferred the stock held by them in the Rockville Wool Stock-raising & Trading Company to Sarah E. Poor, and said company, at a meeting of its board of directors, by resolution accepted such transfer for the benefit of said company, then they are chargeable with a knowledge of the contract under which said transfer was made, and the corporation could not keep the stock so received and refuse to perform the contract by which it procured the transfer to be made."

Now, if T. S. Lang and his wife had transferred the stock held by them to the company, that might raise the question whether the company was authorized to assume the liability; and if they were, which may be conceded, the ratification would be good. More, if Lang and his wife transferred to Sarah E. Poor for the benefit of the company, and the company accepted such transfer, then it may be said that the company is chargeable with a knowledge of the contract, etc. But there is no resolution of the company to this effect. The only resolution in the record having reference to this matter recites the fact that Lang and his wife sold their stock in the company to *Sarah E. Poor*, and the further fact that "having no means to pay the debt against T. S. Lang," etc., it is "hereby canceled." But there is nothing in this which suggests that Sarah E. Poor took the transfer "for the benefit of the company," or any evidence that the corporation "accepted" a transfer of stock which had been made, not to it, but to Sarah E. Poor, who thereby became a stockholder. Nor is there anything to show that the company claimed, professed to own, or kept the stock. The facts show the stock did not belong to it, and there is nothing in the record inconsistent with this. Unless there are particular circumstances to stamp it as such, the fact that a stockholder in a company transfers his stock to an individual, cannot be construed as a transfer for the benefit of the company. It is simply an individual act between the parties. The company derives no benefit from it. It is a private transaction, and, whatever knowledge the company may have respecting it, it neither creates nor discharges any liability. We are unable to discover any error except the assignment in relation to the amount of the judgment and rate

of interest, which it is admitted was a mistake, and of which the defendants were notified by the plaintiff; and for the amount thus modified the judgment is affirmed.

(13 Or. 220)

**COHN and others v. OTTENHEIMER and another.**

Filed February 25, 1886.

**1. PLEADING—COMPLAINT—DEFECT OF PARTIES—DEMURRER.**

When it is shown upon the face of the complaint that the presence of other parties not brought in is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff or defendant, but not when there are already too many brought in.

**2. SAME—FILING OF DEMURRER—PROPER COURSE THEREUPON.**

After a demurrer is filed the only proper course for the opposing party is to bring it on for hearing. A motion to strike out parts of it is not to be entertained.

**3. SAME—IMPROPERLY UNITING CAUSES OF ACTION—DEMURRER—NEXT PROCEEDING BY PLAINTIFF.**

A demurrer to a complaint for an improper uniting of causes of action goes to the complaint as a whole, and the only course of plaintiff thereupon is to file an amended complaint, leaving out the objectionable causes of action.

**4. SAME—CODE—USE OF TERMS.**

In pleading under the Code the terms employed in the Code should be used, and not terms, now obsolete, obtained from the old common-law system.

*Wm. M. Ramsey and G. J. Bingham*, for appellants.

*X. N. Steeves*, for respondents.

THAYER, J. The respondents commenced a suit in the court below to foreclose a mortgage executed to them by Charles and Sarah F. Littlefield upon certain lots of land in Baker City, in the county of Baker. The mortgage bears date May 19, 1883, and was given to secure the payment of a promissory note executed by the mortgagors to the mortgagees for the sum of \$1,625, bearing even date with the mortgage, and payable 12 months thereafter, with 10 per cent. interest. Said Charles Littlefield and Sarah F. Littlefield are husband and wife, and were such when said note and mortgage were executed, and had been for a long time prior thereto. They were made defendants in the suit, and the appellants, Ottenheimer & Heilner, who are partners in business, were joined with them as defendants. The respondents set out in their complaint, after alleging a cause of suit against the makers of the note and mortgage, and that said Ottenheimer & Heilner claimed some interest in the mortgaged premises as judgment creditors subsequent and subject to the respondents' mortgage, the following: "And the plaintiffs herein, in order to protect and hold their security upon said mortgaged property, and that the plaintiffs may realize the full amount of their debt out of said property, the plaintiffs demand the relief hereinafter specified, which application is based upon the following facts;" and then proceeded to show upon what Ottenheimer & Heilner based their claim, viz.: That on the fifth day of January, 1880, the Littlefields conveyed by deed the said lots to one Shaw, and that on the sixth day of January, 1880, Shaw and

his wife, by deed, conveyed them to Mrs. Littlefield; that the deeds were in due form and duly recorded, and that as a matter of record the fee-simple title was in Mrs. Littlefield at the time she and her husband executed to the respondents the said note and mortgage; that on the first day of September, 1883, said Ottenheimer & Heilner commenced a suit in equity against the Littlefields and Shaws, charging that said deeds of the fifth and sixth of January, 1880, were executed to defraud creditors, and were void, and demanded that they be so declared as to them, and that said Littlefields be enjoined from transferring or selling the property, and that a certain patent from the United States to the said Charles Littlefield be placed upon record, and that the property be subjected to their judgment they had obtained for the sum of \$628, and costs, against the said Charles Littlefield on the seventh day of November, 1881, in the said circuit court long prior to the said deeds; that thereafter the said circuit court, by its decree, granted the relief claimed in the said complaint; that the respondents extended credit to Mrs. Littlefield upon the honest belief of her solvency and ability to maintain such credit from the fact that she was in possession of said property claiming to be the owner thereof, and the records of the county showing that she was such owner in her own right, and that they had no knowledge or notice of any fraudulent conveyance thereof alleged in the said complaint; that they were *bona fide* mortgagees of the property for said sum of \$1,625, and the interest thereon; that the said Ottenheimer & Heilner threaten and are about to issue execution upon said judgment, and apply the property upon the same by sale thereof to satisfy said judgment; that said decree was recovered on or about the fifteenth day of May, 1884, and that it constitutes a cloud upon the title of said property, and greatly depreciates its value as a security to the respondents for the payment of said note; that the issuance of said execution and levy upon the property will greatly depreciate its value, be a fraud upon the respondents' right under the mortgage, and entail a multiplicity of suits to remove a cloud on the title so far as their interests therein are concerned; that the property is a scanty security for the payment of the mortgage debt, interest, and costs, and said mortgagor is unable to pay the debt; that said Ottenheimer & Heilner are charged by the records with notice of the mortgagees' prior right under the mortgage, and their threatened intent to issue the execution is to injure and defraud the respondents; and concluded with a prayer for a judgment against the mortgagor Mrs. Littlefield, and for the usual decree of foreclosure of the mortgage; also for an injunction against Ottenheimer & Heilner, restraining them from issuing such execution or incumbering the mortgaged property by levy, sale, or possession.

I have only attempted to set out the substance of the extra matter inserted in the complaint in order to obtain the special relief therein prayed, but have shown enough of it to show its character.

It is very apparent to my mind that it is wholly surplusage. It was unfortunate that the respondents' attorney in draughting the complaint conceived the idea that it would be necessary to insert such matter in the pleading, and why he did so I am unable to understand. It could serve no earthly benefit, in any view, and he took upon himself the risk of occasioning a jumble in the proceedings, and succeeded most admirably. It is not astonishing that such was the result. He lugged into the case an issue wholly unnecessary to the relief sought, and it could not very well fail to create confusion and entanglement. This would have been to a great extent avoided if the appellants' attorneys had adopted the proper remedy and the circuit court had acted promptly. But one blunder is often the parent of another, as the sequence herein proves. The appellants' attorney, when he encountered this anomalous complaint, instead of moving the court to strike out the redundant part, filed a demurrer to the whole of it, specifying five distinct grounds, some of them entirely untenable and others farcical.

The first ground was that there was a defect of parties in that, to-wit, the defendants Ottenheimer & Heilner were joined as parties with the Littlefields. The literal import of that must be that there were too few parties because there were too many,—a remarkable proposition of logic. The non-joinder of parties as plaintiff or defendant never meant the misjoinder, and the latter is not a cause of demurrer under our Code. When it is shown upon the face of the complaint that the presence of other parties not brought in is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties plaintiff or defendant, but not when there are already too many brought in. The only consequence attending the latter case is that a cause of action must be shown in favor of all the plaintiffs and against all the defendants that have been joined as such; otherwise the defendant might demur, but not for a defect or misjoinder,—it would be upon the ground that the facts did not state a cause of action.

The second ground of the demurrer was that the complaint was "multifarious." I suppose the pleader meant by this that several causes of suit had been improperly united, and why he could not have said so, and have pointed out the several causes of suit so united, is strange. The term "multifariousness" has not been used in our Code of Procedure for nearly 25 years, and for nearly 40 years in the state from which the system was taken. There could have been no advantage gained by employing an obsolete term in pleadings. It is much better in such cases to use the words of the Code, although the ancient term, by legal construction, may substantially mean the same thing.

The third ground, that the complaint did not state facts sufficient to constitute a cause of suit against Ottenheimer & Heilner; the fourth, that the court had no jurisdiction of the subject of the suit;

and the fifth, that the complaint did not state facts sufficient to constitute a cause of suit,—were proper in form, but wholly untenable.

After the demurrer was filed, the respondents' attorney, instead of bringing it on for hearing, which is the only mode under the Code of having it disposed of, filed a motion to strike out parts of it. This was sheer absurdity. Circuit courts should promptly rebuke so flagrant an irregularity. It seems from the record that the motion was disregarded in this instance, but by consent of parties "respectively." If countenance is given to such anomalies, we will soon have no system whatever in our practice,—it will become a mere jumble. It further appears from the record that the demurrer was heard by the court, and "after being fully advised in the premises" the court found that the objection to the complaint for "multifariousness" was well taken, and that upon said objection said demurrer should be sustained; and it was thereupon ordered that the demurrer be sustained, and that the plaintiffs in the suit have leave to amend their complaint. Further on in the record it will be discovered that upon a subsequent day (the first day of November, 1884) the respondents' attorneys filed another motion,—a motion to so amend the journal entry respecting the demurrer "as that the same distinctly specify the parts of the complaint adjudged by the court to be 'multifarious,' and as to what part of the complaint the demurrer was overruled." This motion was entirely gratuitous and groundless. When the demurrer was sustained in consequence of the complaint being multifarious, or, more appropriately, because it contained distinct causes of suit improperly united, the complaint was overthrown. The court could not pick out the part that was multifarious and that which was not. It was either all multifarious or none of it was. The objection upon such grounds is not that the several causes of suit so united are severally insufficient. Each may contain a good cause of suit and be well pleaded, yet could not properly be united in the same suit. To illustrate: if a party should unite in a complaint a cause of suit to quiet his title to certain real property, and a cause of suit to compel the specific performance of a contract to convey to him other real property, his complaint could be demurred out, although the facts pleaded were amply sufficient to sustain the suits, if severally brought. The only course to pursue in such a case is to permit the party to elect which of the two he will proceed upon in the suit commenced. The sustaining of the demurrer was a determination that the suit must stop, and the only way to continue its prosecution was by filing an amended complaint leaving out one of the causes of suit contained in the original complaint, unless the court adopted the course I have known able courts to pursue, which has been to consider the demurrer as a motion to strike out where the remedy should have been by motion in the outset. But I think, then, it would be better to allow the demurrer to be withdrawn and the motion substituted in its place. But the circuit court in this case followed another course. It heard

and granted the motion to correct the journal entry. It concluded that the former entry upon the subject was "indefinite, and did not state fully the judgment of the court upon said demurrer," and caused the following entry to be made:

"Therefore said journal entry and judgment upon said demurrer aforesaid is hereby amended to read as follows: That there be, and is hereby, sustained all portions of the complaint in this cause consisting of Exhibit A, the title of the cause, and the following allegations contained therein, to-wit."

Then follows a form of the complaint similar to the original, after leaving out the facts relating to the special or auxiliary relief therein sought, but which contained record copies of said deeds to Shaw, and from Shaw and wife to Mrs. Littlefield, of January 5 and 6, 1880, which must have made 12 or 14 pages of solid journal entry. It is hard to understand what this performance was intended for. It, to my mind, was a very awkward and unwieldy affair, and extrajudicial. But it appears that subsequently, and on the seventh day of November, 1884, the said circuit court proceeded to adjudicate upon the affair, as appears from a journal entry of that date, which recites "that the cause came on to be heard, the plaintiffs appearing by their attorneys, and the defendants Ottenheimer & Heilner having heretofore appeared herein by demurrer to the complaint, etc., and the judgment upon the demurrer having been duly entered, whereby a portion of the complaint was adjudged ill, and was stricken out, and the remaining portion adjudged good and sufficient, and said demurrer thereto overruled and denied, and the said defendants Ottenheimer & Heilner having failed to make any further or other defense herein, and not having asked further time in which to make such other or further defense, it appears that the plaintiffs are entitled to the relief prayed for," etc. Then follows a decree foreclosing the mortgage, and barring the said Ottenheimer & Heilner of all right, etc., in the premises, which is the decree appealed from herein. The case does not appear to be here for a trial upon the merits, but to obtain a reversal of the decree for having been improperly entered, and I see no other course than that it will have to go back, and the appellants have an opportunity to defend against the claim of priority of the respondents' mortgage over their judgment. It all occurs from a neglect to follow the plain provisions of the Code of Practice. If the respondents' attorneys had drawn a simple complaint containing the facts of the execution of the note and mortgage, an allegation that Ottenheimer & Heilner had or claimed an interest in the mortgaged premises, but that it was created subsequent to the execution of the mortgage and subject to the lien thereof, and demanded a decree against the makers of the note, and a sale of the property to satisfy it, the whole matter could have been adjudicated. Ottenheimer & Heilner would have been compelled to come forward and present what claims they had, and any facts alleged in regard

thereto which the respondents controverted could have been denied or avoided by a reply.

Again, if there had been no attempt to patch up the first journal entry, but the respondents had filed and served a copy of an amended complaint, as the Code requires when a demurrer is sustained, and the plaintiffs plead over, the case would have proceeded with reasonable regularity; but that second journal entry was outlandish. The journals of a court should never be incumbered in that way; besides, it amounted to nothing. Making an entry of the part of the complaint that the court "adjudged good and sufficient" was a work of supererogation. It could not dispense with the necessity of afterwards writing out the complaint, signing and having it verified, and placed among the files of the case. Otherwise, as suggested by the appellants' counsel upon the argument of the appeal, how could a judgment roll be made up, or how could the appellants be called upon to answer a journal entry? The appellants could not be adjudged in default until a copy of the amended complaint had been served as provided by section 68 of the Code, and the time for answering it prescribed by the court had expired. These rules of practice must be observed or the course of procedure in the prosecution of lawsuits will become chaotic. We have a Code which prescribes the mode to be pursued in such matters, and while legislative sanction gives it all the authority it possesses, yet it is something beyond a mere statute. It is a system devised and perfected by learned and able lawyers inspired by the principles of common-law practice and proceedings, with which they were familiar, and upon which they laid its foundation. Because it is plain, simple, and common, affords no excuse to practitioners for being ignorant of its requirements, nor relieves them from the necessity of observing those regulations which wisdom and experience dictate as the best mode to be pursued.

The decree must be reversed; the case remanded to the circuit court with leave to the respondent to file an amended complaint; that a copy thereof duly certified be served upon the appellants' attorneys, and that the appellants be required to answer the complaint within such time as the circuit court may prescribe; that the appellants recover costs on the appeal, and that the respondents pay the fees for the entry of the said decree, and for making said second journal entry; that the other costs and disbursements abide the final result of the suit.

## SUPREME COURT OF IDAHO.

(2 Idaho [Hasb.] 184)

TOULOUSE and others v. BURKETT, Adm'r.

Filed February 15, 1886.

## 1. EXECUTORS AND ADMINISTRATORS—EQUITABLE CAUSE OF ACTION.

In cases purely equitable, and in which purely equitable relief is sought, the cause of action set out in the complaint does not constitute a "claim" which must be presented to the administrator before an action can be maintained, under section 188 of our probate practice act.

## 2. APPEAL—ERROR—WHEN REVIEWABLE.

Errors in findings of fact, on the ground that they are not supported by the evidence, can only be reviewed in the appellate court on an appeal from an order overruling a motion for new trial.

## 3. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—ALLEGATIONS.

In actions against an estate it is not necessary to allege in the complaint that the "claim" sought to be collected has been presented to the administrator for his allowance.

Appeal from Alturas county, Second judicial district.

*Kingsbury & McGowan and Brumback & Lamb*, for appellants.

*A. F. Montandon*, for respondent.

BUCK, J. The plaintiffs in this action were partners, doing business as miners, in Alturas county, in this territory, and the owners of certain mines mentioned in the complaint. On the fifteenth day of October, 1881, they executed and delivered to Nicholas Boucher, and to his heirs and assigns, a deed of the undivided one-third of said mines, in consideration of \$2,000. The said consideration was not paid at the time said deed was delivered to said grantee, but said indenture of deed contained the stipulation by the grantors that said grantee "agrees to work on said mines, without remuneration, until the same are sold or otherwise disposed of; and should the same be sold, or mineral extracted therefrom be sold, the grantors shall receive the said two thousand dollars' consideration out of the first money received from said sales over and above the value of said services of grantee." The complaint alleges that said conveyance was made and delivered in pursuance of a contract of partnership between the grantors and grantee therein, whereby the partners were each to own one-third of said mines, and be equal partners in working the same; but through accident and mutual mistake, all of said parties being illiterate and of foreign birth, not understanding the English language, the intended contract of partnership, with condition to convey the one-third interest in said mines, was made to convey said interest absolutely, and without fully stating the terms and conditions of said partnership and of said conveyance; that said grantee received the benefits of said contract with plaintiffs on said mines, worked according to said agreement until August 24, 1882, when a contract of sale of said mines was made; that afterwards, the

said sale not being made, the plaintiffs and the grantee, Boucher, received \$4,000 forfeit money therefrom, which sum was paid to said Boucher, and by him divided equally between them, the said Boucher retaining therefrom \$1,333.33; that said forfeit was first paid to said Boucher, and one-third retained by him, against the protest of plaintiffs, who claimed the same as a part of the proceeds of the said mines which should be applied on the said purchase price of \$2,000; that, after the receipt of said forfeit money, said Boucher refused and neglected to work on said mines, and left the same, and continued away therefrom until the first day of June, 1883, when he died, and defendant, Burkett, was duly appointed administrator of his estate. The complaint further alleges that the plaintiffs have performed their part of said agreement of sale and partnership, but that neither Boucher nor his representatives have performed their part thereof, but have refused so to do, and still refuse and neglect to fulfill the same; that at the date of the commencement of this action there was 546 days' labor due from defendant on said contract. Wherefore plaintiffs pray that said deed be rescinded; that said contract be reformed to comply with the real understanding of the parties; that said defendant, as administrator of the estate of said Boucher, be decreed to reconvey said one-third interest to plaintiffs, and, in case said relief cannot be granted, the vendor's lien on said premises be foreclosed and sold to pay the amount ascertained to be due plaintiffs in consequence of a breach of said contract; that plaintiffs have a personal judgment against defendant for any deficiency; and for such further relief as may be agreeable to equity. The defendant answered the complaint, admitting that plaintiffs were the owners and in possession of said mines, as alleged in the complaint, by a failure to deny the same, and the making and delivery of said deed, but denies all the other material allegations of the complaint, and prays that the suit be dismissed at plaintiffs' costs. The case was tried by the court, and the findings of fact sustain the allegations of the complaint, with the exception of findings that there was no mistake in the execution of the said deed; that the plaintiffs were entitled to two-thirds of 500 days' labor from said Boucher, or on his behalf, from said mines, and that the said labor is of the value of four dollars per day, amounting to \$1,333.33.

As conclusions of law the court find:

(1) "That two thousand dollars is due plaintiffs from said estate of Boucher, and is a lien upon the interest in said mine described in said deed." (2) "The \$1,333.33 due plaintiffs for labor, as aforesaid, is a part of the purchase price of said mine, and is a valid lien on the same." (3) "That, by the commencement of this action, the plaintiffs elected to terminate the contract, and that they are not allowed any other or greater sum than is herein allowed for the failure to perform said contract." (4) "That the \$4,000 forfeit money was received by all the parties, and settled between themselves, and plaintiffs are not entitled to recover the same." (5) "That upon the sale of the property by the administrator he should settle and discharge the costs of this ac-

tion, and the sum of \$1,333.33 herein declared to be a lien upon said premises."

The defendant appeals from the judgment, and incorporates in the record a bill of exceptions. In the bill, exception is taken to several of the findings of fact by the court as being contrary to the evidence; but as no part of the evidence in the court below is brought up in the record, this court has no means of determining the correctness of the findings of fact. It is also well established that exceptions to findings of fact, on the ground that they are contrary to the evidence, can only be reviewed on a motion for new trial. *Pico v. Cuyas*, 47 Cal. 174; *Rice v. Inskip*, 34 Cal. 224; Code Civil Proc. § 411; *Hayne*, New Trials, § 96.

The second point made in appellants' brief is that the complaint is not sufficient to sustain the judgment, in that it fails to allege that the claim of plaintiffs was presented to the administrator for his acceptance or allowance. Prob. Act, § 138. Upon this objection it has been held in the adjudicated cases that it is not necessary to allege the presentation and rejection of the claim, but that it may be proven on the trial without such allegation. *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568. It is, however, admitted by respondent that no such evidence was in fact given, and it is insisted that the cause of action, as set out in the complaint, is not a "claim," in contemplation of the probate act.

In *Gray v. Palmer*, 9 Cal. 616; in which very elaborate briefs were prepared, and exhaustive arguments were made, to determine the signification of this term, as used in the statute identical with our own, the court say:

"It would seem clear from the different sections of the act, construed together, as well as from the nature and reason of the case, that the words 'claimant' and 'claim' are used as synonymous with 'creditor' and 'legal demand for money.'"

In *Fallon v. Butler*, 21 Cal. 24, a suit to foreclose a mortgage, Judge FIELD says:

"The term 'claim' in the probate act only has reference to such debts or demands against the decedent as might have been enforced in his life-time by personal actions for the recovery of money, and of which only a money judgment could have been rendered."

The adjudicated cases, and the reason of the law, indicate the rule to be as suggested by Justice FIELD, above cited: that in cases purely equitable, or in which a purely equitable relief is sought, the cause of action set out in the complaint does not constitute a "claim" which must be presented to the administrator, under section 138 of our probate act, before an action may be maintained. This is held to be the rule in actions for the foreclosure of mortgages and liens where personal judgments over are not sought.

In the case at bar the plaintiffs were in the possession of the property in dispute, and had a vendor's lien thereon for the unpaid pur-

chase price. The real object of the suit was to foreclose this lien. It is true, the plaintiffs demanded a personal judgment over against the administrator. The test, however, is not what a litigant demands, but what he is entitled to receive. His prayer for general relief enabled the court to grant such relief as was agreeable to equity.

The only remaining point is that the plaintiff Toulouse was permitted to testify, against the objection of defendant and contrary to section 898, subd. 3, of our Code of Civil Procedure, as to the ownership and possession of the mines conveyed at the time the deed was made. An inspection of the pleadings shows that such ownership and possession was alleged in the complaint, and not denied in the answer. The testimony referred to could not have injured defendant, as it went to facts admitted in the pleadings.

We find no error in the trial below, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

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PETITION FOR A REARGUMENT.

Filed March 8, 1886.

BUCK, J. On February 15th the decision of the court herein was announced, confirming the judgment appealed from. On the 23d the appellant filed his petition for a reargument. As a basis for the petition, it is set out that the court was mistaken in stating that the allegation of ownership and possession of the premises in dispute set out in the complaint was admitted in the answer, by a failure of defendant to deny the same, and on the further ground that the cases of *Gray v. Palmer*, 9 Cal. 616, and *Fallon v. Butler*, 21 Cal. 24, are practically overruled in *Ellis v. Polhemus*, 27 Cal. 354, and in *Pitte v. Shipley*, 46 Cal. 162. The allegation of ownership and possession of the premises in dispute are denied in terms, but admitted in fact in the answer. The defendants allege in their answer that the quitclaim deed set out in the complaint contained the exact understanding of the parties, and that there was no mistake or misunderstanding. If this be true, the defendants stand in the relation of vendee of the plaintiffs, the vendors in the deed. This action is brought to foreclose the vendor's lien for alleged unpaid purchase money. In such an action the vendee is estopped from denying his vendor's title. While in some actions the vendee may dispute his vendor's title, the doctrine is (Bigelow, Estop. 415) "that, until the grantee has paid for the land, he holds, in respect to the payment, a relation of duty to the grantor similar to that of tenant and landlord. The grantee cannot escape the payment of the purchase price by disclaiming the title of his grantor." In the case at bar the defendant admits that whatever rights he has to the premises he has by virtue of purchase from plaintiffs, and in an action to foreclose the vendor's lien for purchase price, admitting as he does the purchase, the issue

is, is there purchase money due? He cannot disavow his vendor's title on that issue. Bigelow, Estop. 414. The effect, therefore, of the defendant's answer is to deny the plaintiffs' allegation of ownership in form, and to admit it in fact.

It is claimed in the petition, also, that the California cases cited in support of our decision as to the word "claim" have been substantially overruled in later cases. In support of this statement the petitioner cites *Ellis v. Polhemus*, 27 Cal. 354, and *Pitte v. Shipley*, 46 Cal. 162. The signification of this term has been under discussion in the California courts since 1858; commencing with *Gray v. Palmer*, 9 Cal. 616, and continued in *Fallon v. Butler*, 21 Cal. 24; *Ellis v. Polhemus*, 27 Cal. 354; *Christy v. Dana*, 34 Cal. 553; *Sichel v. Carillo*, 42 Cal. 505; *Pitte v. Shipley*, 46 Cal. 155; and *Estate of McCausland*, 52 Cal. 568. Much that has been said in the discussions of this question has been outside of the issues. We find in them nothing to change our opinion upon this question at issue. It is evident that the courts of that state do not understand that the cases referred to have been overruled. In *Estate of McCausland*, above cited, the court say:

"In *Fallon v. Butler*, Mr. Chief Justice FIELD said: 'Whatever signification there may be attached to the word "claim," standing by itself, it is evident that in the probate act it has reference to such debts or demands against the decedent as might have been enforced against him in his life-time, by personal action, for the recovery of money, and upon which only a money judgment could have been rendered.'"

This definition, they say, "in our opinion, is correct."

We are unable to see that any benefit would arise by a reargument of the case, and the prayer of the petitioner is therefore denied.

HAYS, C. J., and BRODERICK, J., concurring.

(2 Idaho [Hasb.] 193)

#### PEOPLE v. BERNARD.

Filed March 3, 1886.

##### 1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

Under the criminal practice act the trial court in charging the jury may state the evidence and declare the law.

##### 2. SAME—ENTIRE CHARGE MUST BE CONSIDERED.

The entire charge on a particular point must be considered in determining whether or not it is misleading.

##### 3. SAME—INSTRUCTION HELD PROPER.

The instructions herein examined, and held not prejudicial to the defendant.

Appeal from First judicial district, county of Nez Perces.

*Brumbach & Lamb*, for appellant.

*D. P. B. Pride*, Atty. Gen., for the State.

BRODERICK, J. The defendant was accused of the murder of John J. Enright, was tried, and convicted of manslaughter, and sentenced to hard labor in the territorial prison for eight years. From this

judgment he appeals. The first point made on his behalf on the appeal is that the court erred in giving the jury the following instruction:

"Evidence has been given tending to show that the deceased, John Enright, entered the printing office of the defendant for the purpose of taking therefrom his blankets, and that while there he addressed to defendant certain language which you remember, and thereupon the defendant got down from the printing stool and ordered him, Enright, out of his office; that said Enright not going on such order, the defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died."

The criticism on the foregoing instruction is on the latter part of it; that is, it is claimed the court erred in saying to the jury: "The defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died." Under our statute (criminal practice act, § 354) the court, in charging the jury, may state the testimony and declare the law; this is what was here done. We cannot by any rule of law subdivide this instruction in the manner contended for, but we must take and consider the entire paragraph, and thus determine whether or not it was misleading. Certainly, under our practice and the circumstances of this case, it was not error for the court to tell the jury that there was evidence *tending* to prove the facts as stated in this instruction.

The second alleged error complained of is the giving of the following instruction:

"There must be danger of personal injury, or the fear of personal injury, to that extent that the only means to avoid the loss of life, or great personal injury, is to kill the assailant."

Section 26 of crimes act fully warrants this instruction. Had this section of the statute been copied and given as an instruction, the defendant would have had as good ground for complaint as he has against the one given and here objected to.

The third and last alleged error complained of is in giving the following portion of an instruction: "And that he had in good faith endeavored to decline any further struggle before the fatal shot was fired." It is apparent from the reading that this is not a full or complete sentence. It is selected and taken from a charge which, in the main, is unobjectionable. As the facts appear to us, these lines might have been omitted from the paragraph, but we are unable to see how any substantial right of the defendant could have been prejudiced by them. The meaning of the court below cannot be fairly ascertained by a partial view of what the jury was told was the law by which they should be governed in determining a question of fact. To arrive at such meaning we must look at the entire charge upon the point to which it relates. This rule is recognized in numerous decisions. *People v. Nelson*, 56 Cal. 81, and cases cited; *People v. Welch*, 49 Cal. 182; *People v. Doyell*, 48 Cal. 93; *U. S. v. Snow*, 9 Pac. Rep. 501. Section 482 of the criminal practice act provides

that we must give judgment here without regard to technical error or defects which do not affect substantial rights. The statute authorizes the entire instruction from which the words objected to are taken to be given in a proper case, and we understand that it is supported by the general doctrine. Whart. Hom. 485, and cases there cited.

From an examination of the evidence and the entire record we are satisfied the defendant could not have been injured by these instructions, or either of them, and that he had a fair trial, and was rightly convicted. Judgment affirmed.

HAYS, C. J., and BUCK, J., concur.

(2 Idaho [Hassb.] 185)

SALT LAKE BREWING CO. v. GILLMAN and others.

Filed March 8, 1886.

1. APPEAL FROM JUSTICE'S COURT—PERFECTING APPEAL.

To effectuate an appeal from a judgment of a justice of the peace three things are required: the filing of the notice of appeal with the justice, the service of a copy of the same on the adverse party, and the filing of the undertaking; and all these things must be done within 30 days after the rendition of the judgment, and are jurisdictional prerequisites; but the mere order in which they are done is not material.

2. SAME—NOTICE—SERVICE.

Where judgment was rendered in a justice's court on October 2, 1885, and the notice and undertaking on appeal were filed with the justice on the sixth of the same month, and the notice of appeal was served on the fifteenth of the same month, *held*, that the statute was complied with, and the appeal well taken.

3. SAME—STATUTE REGULATING APPEALS.

The statute providing for appeals from justice's and probate courts, and the provisions for appeals from district to the supreme court, considered and distinguished.

4. SAME—ACCIDENT OR MISTAKE PREVENTING OBJECTION TO UNDERTAKING WITHIN FIVE DAYS.

Where, by accident or mistake, the respondent is prevented from objecting to the sufficiency of the undertaking within five days after the filing, may such objection be made at any time a substantial defect is ascertained? Noticed, but not decided.

Appeal from Second judicial district, county of Alturas.

The facts appear in the opinion.

*Kingsbury & McGowan*, for appellants.

*F. E. Ensign*, for respondents.

BRODERICK, J. On the second day of October, 1885, the plaintiff recovered judgment against the defendants before a justice of the peace in Alturas county. On the sixth day of same month the defendants filed with the justice their notice and undertaking on appeal, and on the fifteenth day of the same month they served upon the plaintiff a copy of the notice of appeal. The transcript and papers on appeal were transferred to the district court, and the plaintiff there moved to dismiss the appeal on the ground that the district court had not acquired jurisdiction of the same, as no undertaking

on appeal had been filed since the notice of appeal was served. The motion was overruled and denied, and from the order of the district court the plaintiff appeals to this court.

It is contended on behalf of the plaintiff that the appeal was not taken in the manner required by law, and in support of this proposition we are referred to *Shissler v. Crooks*, 1 Idaho, 369; *People v. Hunt*, Id. 371; *Clark v. Lowenberg*, Id. 654. These decisions were made upon the statute which provides for "appeals in general," or perhaps, more correctly speaking, for appeals from the district to the supreme court. This statute differs essentially from the one we are now called upon to consider and construe, and hence the cases cited, while doubtless correct upon the questions there presented, have no application to the case at bar.

By section 665 of the Code of Civil Procedure it is provided that "any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party." Section 668 provides in substance that upon receiving the notice of appeal, and on payment of the fees of the judge or justice, and filing an undertaking as required in the next section, and after settlement of the statement, if any, the judge or justice must, within five days, transmit to the clerk of the district court, with the papers in the case, a transcript of the docket entries. By section 669 it is further provided that "an appeal from a justice's or probate court is not effectual for any purpose, unless an undertaking *be filed*, with two or more sureties," etc.

It may here be observed that this statute, unaided by any other, prescribes the mode or manner of appeal from judgments rendered in probate and justice's courts. Three things are made indispensable: the filing of the notice of appeal, the service of a copy of the same on the adverse party, and the filing of an undertaking; and all these things must be done within 30 days from the rendition of the judgment, and are jurisdictional; but the statute does not prescribe the order in which these several steps must be taken. Here the notice of appeal and undertaking were filed four days after the judgment was rendered. This did not effectuate the appeal until the notice was served as required by law. The notice was served nine days after the filing, and it will be seen that all these acts were done within the statutory time, and we cannot think that the mere order in which they were done is material. It has been, in effect, so held under the statute from which ours was copied. *Coker v. Superior Ct.*, 58 Cal. 177; *Hall v. Superior Ct.*, 8 Pac. Rep. 6.

The plaintiff insists that by reason of the filing of the undertaking on appeal prior to the service of notice that he was denied his statutory right of objecting to the sufficiency of the sureties. It is true

the statute provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, but we are inclined to believe that this statute is only directory, and that an insufficient undertaking may be objected to when a substantial defect is ascertained, or that the defect or irregularity may be waived. *Rabe v. Hamilton*, 15 Cal. 32. It will be seen that the statute does not require notice to be given of the filing of the undertaking; service of notice of appeal is the requirement, and this need not necessarily be done before the undertaking is filed. The statute does not require it. In construing a statute we must look to the language used, and endeavor, if possible, to ascertain the intention of the legislature; and applying this rule to the statute in question we are unable to see that anything more was intended than that the appeal should be perfected within 30 days from the rendition of the judgment.

It may here be observed that no showing was tendered in the court below that on account of accident or mistake the plaintiff had been deprived of the right to object to the sufficiency of the undertaking. No claim was made that the undertaking was for any reason insufficient, or that any injury would likely result; but the plaintiff rested its application on the cold question of jurisdiction. Whether, if it had chosen to pursue the other course suggested, it would have been availing, we do not here decide. On this question we refer, however, to the following authorities: *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Stark v. Barrett*, Id. 364; Hayne, New Trials, par. 214, p. 649; section 668, Code Civil Proc.

After as careful consideration of the question presented by this appeal as we have been able to give, we are satisfied that the ruling of the court below was correct. The judgment and order are therefore affirmed.

HAYS, C. J., and BUCK, J., concurring.

(2 Idaho [Hasb.] 199)

GAFFNEY v. HOYT and others.

Filed March 3, 1886.

1. PARTNERSHIP—EVIDENCE TO PROVE—REPUTATION.

Evidence of common report should only be admitted to prove partnership, in connection with the further evidence that such report was known to the parties sought to be charged.

2. JUDGMENT—MODIFICATION—STRIKING OUT NAME OF ONE DEFENDANT.

The judge of the district court may, upon motion for new trial on the ground of insufficient evidence to sustain the verdict, modify the judgment by striking out the name of one of the parties defendant where several defendants are severally joined.

Appeal from Alturas county, Second judicial district.  
*Kingsbury & McGowan*, for appellant.

*Angel & Sullivan*, for respondents.

BUCK, J. About July, 1883, M. L. Hoyt & Co., doing business as bankers at Shoshone, Alturas county, Idaho territory, received on deposit of the plaintiff, Bartley Gaffney, \$914.20. Shortly after, to-wit, August 3, 1883, the said company sold their said business to Ross Cartee, and gave notice to their depositors to "look to said Cartee for the payment of any money due them from said bank, from the date of said notice." That afterwards, the said Cartee having failed, the plaintiff demanded payment of the said firm of Hoyt & Co. of his said deposit, which demand being refused he commenced this action for the amount claimed to be due. The amended complaint was filed July 11, 1884. It alleged the partnership of defendants, the deposit of the money, the demand of payment, and the refusal to pay; and demanded judgment for the amount due, with costs. The defendants filed their answer August 1, 1884, and interpose a general denial. Neither pleading is verified. The cause was tried by a jury, and they returned a verdict for plaintiffs of \$1,027.69, and judgment was entered thereon, against all the defendants, on the third day of July, 1885. The defendants gave notice of motion to set aside the verdict and judgment, and for a new trial, on the ground of accident and surprise, insufficiency of the evidence to sustain the verdict, newly-discovered evidence, and because the verdict was contrary to law. On the tenth day of October, 1885, the court granted the motion to set aside the verdict as to Wurtelle, overruled the motion as to the other defendants, and reformed the judgment. From the order overruling the motion for a new trial, and from the modified judgment, the defendants appeal, and incorporate a bill of exceptions to the order overruling the motion for a new trial, and a statement, into the record. In the specifications of errors the appellants assign as error:

"*First*, insufficiency of the evidence to prove that the defendants were partners; *second*, that the evidence was sufficient to establish that the plaintiff consented to change his deposit account from Hoyt & Co. to Cartee; *third*, that the court erred in admitting, against the objection of defendants, testimony of common report as to the copartnership of defendants; *fourth*, that the order reforming the judgment is against law."

In the brief of appellant 15 assignments of error are set out; but, as no errors will be considered on appeal that were not set out in the specifications of error in the statement of the case and in the bill of exceptions, we shall consider only those above enumerated.

The first and third assignments of error, to-wit, that the evidence was insufficient to prove that the defendants were partners, and error in admitting evidence of common report to prove partnership, may be considered together. The rule seems to be established, as the result of numerous adjudicated cases, that common report can only be admitted to prove the partnership of the different members of a firm when it is accompanied with evidence that such report was known to

the party sought to be charged. 5 Wait, Act. & Def. 114, and numerous cases there cited; *Bowen v. Rutherford*, 60 Ill. 41; S. C. 14 Amer. Rep. 25; *Brown v. Crandall*, 11 Conn. 92; *Halliday v. McDougall*, 20 Wend. 81.

In the case at bar, the admission of Hoyt in his deposition introduced in evidence, and the admission of Wallace as testified to by Mr. Angel, were sufficient to justify the verdict of the jury as to their partnership. Parties plaintiff are not held to the same degree of strictness in proving the partnership of defendants as they are in proving their own partnership when they bring the action as partners. As to defendants Dodridge and Wurtelle there seems to have been no evidence of their connection with the firm except common report, and indeed Wurtelle seems to have been unconnected with the firm even by common report. While this evidence was competent, yet, without the additional evidence that the report was known to Dodridge and Wurtelle, we think it was not sufficient to warrant a judgment against them.

Upon the hearing of the motion for a new trial the court set aside the verdict and judgment as to Wurtelle, and overruled it as to the other defendants. It is insisted by appellants that it was error to modify the judgment by striking out one of the parties. The defendants, by their answer, put in a general denial, and thus deny the partnership, and also their several liability. They are in no way jointly interested in their defense. Upon their motion for a new trial they severally insist that the evidence is insufficient to establish either their joint liability as partners, or their several liability as individuals. The court, in its discretion, sustained the motion as to defendant Wurtelle, and overruled it as to the others. Section 352, Code Civil Proc., provides "that in actions against several defendants the court may, in its discretion, render judgment against one or more of them." It is claimed upon the argument that thus diminishing the number of defendants increases the burden of those remaining; but defendants themselves deny joint as well as several liability. If they were not partners with defendant Hoyt, they should not be held. The burden should rest upon him and his partners. If any of the defendants were likely to be prejudiced through the want of evidence on the part of plaintiffs to prove who all of the partners were, the defendants were in a position to furnish the evidence as to the actual members of the firm, and thus distribute the burden where it rightfully belongs. We think the court below had authority to modify the judgment. *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 279.

The next alleged error is the overruling of the motion for a new trial on the ground of newly-discovered evidence. Evidence was admitted by defendants tending to show that plaintiff drew two checks upon Mr. Cartee after Hoyt & Co. had transferred their interest in the bank, and it is claimed that the drawing of said checks was evidence showing that the plaintiff accepted said Cartee for said depos-

its, and thus released Hoyt & Co. The plaintiff, in rebuttal, denied the signing of said checks, which evidence defendants claim was surprise to them, and they produced the affidavit of said Cartee, on the motion for new trial, to the effect that he (Cartee) would testify that plaintiff, Gaffney, actually signed said checks. The answer contains no allegation that plaintiff accepted said Cartee, and released Hoyt & Co. from said deposit. The answer contains a simple denial of the partnership, the deposit, the refusal to pay, and the indebtedness. These constitute the issues. Evidence of release of Hoyt & Co. and acceptance of Cartee would be entirely outside of the issues, and therefore irrelevant and inadmissible. Clearly it was not error to refuse a new trial upon the discovery of evidence entirely irrelevant to the issues made by the pleadings.

An inspection of the evidence shows that there was no testimony of the liability of either Wurtelle or Dodridge, except that of common report, which was not of itself sufficient to justify the verdict against them. *Ah Lep v. Gong Choy*, 9 Pac. Rep. 483.

We think the judgment should be further modified by striking therefrom the name of Dodridge as defendant, and affirmed as to defendants Hoyt and Wallace, and that the cause be remanded for a modification in the court below in accordance herewith.

HAYS, C. J., and BRODERICK, J., concurring.

(2 Idaho [Hasb.] 204)

#### HOUSER and others v. AUSTIN and others.

Filed March 8, 1886.

##### 1. TRIAL—JURY—SUBMISSION OF ISSUES IN EQUITY CASE.

In equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.

##### 2. CONTRACT—MISTAKE—REFORMATION.

To authorize the reformation of a written contract on the ground of mistake, the evidence must leave no reasonable doubt in the mind of the court as to the mistake.

##### 3. SAME—MUTUAL MISTAKE.

The mistake must be mutual, and it must appear that both have done what neither intended.

##### 4. EVIDENCE—PRESUMPTION FROM KEEPING WITNESS AWAY FROM COURT.

Where a person is proved to have caused a witness to absent himself from the trial, the presumption arises that the evidence of the witness, if given, would be against his interest.

Appeal from Second judicial district, Alturas county.

*Huston & Gray* and *R. Z. Johnson*, (*John T. Morgan*, of counsel,) for appellants.

*Lytleton Price* and *Arthur Brown*, for respondents.

Buck, J. On the fourth day of March, 1884, the plaintiffs filed their complaint herein, alleging that they were the owners as tenants in common of certain mining ground in Alturas county, Idaho territory, known as the "Elkhorn Lode;" that on the third day of October,

1883, by an agreement in writing, they authorized and licensed defendants Austin and Ervin and one Grant to work and mine, and take and extract, ore from a certain portion thereof, particularly bounded and described in said agreement, upon terms expressed therein; that defendants Austin and Ervin commenced work thereon under said agreement about the third day of October, 1883; that said Grant made a pretended sale of his interest under said agreement to defendant Ross about the said first day of December, 1883, and claims no interest under the same; that plaintiffs Houser, Holton & Hale were non-residents of this territory, and plaintiff Lewis was absent therefrom during December, 1883, and January, 1884, and that neither of them had any knowledge of the alleged wrongful acts of defendants set out in said complaint; that about December 1, 1883, defendants fraudulently taking advantage of said license to gain admission to said mines without authority or knowledge of plaintiffs, or either of them, wrongfully entered upon a certain portion of said Elkhorn mine outside of the boundaries of the ground described in said agreement, and wrongfully removed pay ore therefrom, of the value of \$10,000; that the portion of ground so wrongfully entered upon by defendants is very rich in mineral-bearing ore, and defendants threaten to continue their said trespass to plaintiffs' irreparable injury, and plaintiffs believe they will so do unless restrained by order of the court; that soon after plaintiff Lewis returned to the territory he notified defendants to desist from said trespass, and they refuse so to do; and that defendants are insolvent; and pray that defendants may be enjoined from entering upon such portion of said Elkhorn mine as is outside of the boundaries set out in their said agreement, and for general relief.

The defendants, answering, deny the trespass, and allege the verbal agreement or contract existing prior to the written one set out in the complaint included the ground in controversy; that the written agreement was intended to contain the same, and that the plaintiff Lewis fraudulently informed them that it did contain the same; that he put them in possession of the same, and received the two-fifths of the ore extracted therefrom as per condition of the written agreement; and that defendants accepted said agreement believing that it included the mining ground in dispute. Defendants also file a cross-complaint, alleging that they received said agreement believing and understanding that it contained the ground in dispute, that the plaintiffs so represented to them falsely, and that they relied on said representation. They further allege, among other matters, that they entered upon said premises under said agreement, and discovered a rich body of ore thereon of the value of \$200,000, which they were prevented from extracting by plaintiffs' injunction herein; that plaintiffs had extracted the same and appropriated the same to their use, and that in consequence of said injunction restraining them from working said ore, they had been put to additional expense in the amount of

\$2,000, in opening other ore bodies under said agreement; and prayed that said agreement might be so reformed as to include the ground in dispute; that they (defendants) be adjudged owners, and entitled to all the said Elkhorn lode on the dip thereof having its apex within the premises described in said agreement, and the right to mine and remove the same, and for other and equitable relief.

The plaintiffs, answering, deny the material allegations in the amended cross-complaint, and ask that it be dismissed, at defendants' costs, and for further and equitable relief.

Upon the trial of the case a jury was requested by the defendants to try the cause, and, under objection of plaintiffs, the court impaneled a jury, and of his own motion submitted to them the following special questions:

"Question 1. Did the lessees in the lease, or defendants, enter upon the premises in dispute, and mine and extract ore, with the knowledge, consent, and by authority of plaintiff Lewis, or did they enter without his knowledge, consent or acquiescence? *Answer.* They entered and extracted ore with his knowledge, consent, and acquiescence. Q. 2. Did the plaintiffs, or either of them, by themselves or their agents, receive or retain the two-fifths royalty knowing that the ore was extracted by the defendants and Grant from the premises in dispute? A. They did receive it knowing it to be from the ground in dispute. Q. 3. Did the original verbal agreement for the lease include the premises in dispute, viz., all ground north-east of the east tunnel, and was it omitted from the writing either by mutual mistake or fraud of the plaintiffs? A. It did, and was omitted by mutual mistake." "Q. 5. What is the value of the ore the three defendants could have extracted between date of service of injunction, March 8, 1884, and July 1, 1884? A. \$53,160. Q. 6. And what was the extra damage by being driven out and compelled to drive new tunnels to reach ore? A. \$1,500."

To the admission of the last two questions, to-wit, 5 and 6, defendants objected on the ground that the equitable issues should be first settled, and assign the submission of all of said questions at the same time to the same jury as error. In support of this alleged error the appellants cite *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, Id. 660; *Arguello v. Edinger*, 10 Cal. 160; *Harrison v. Juneau Bank*, 17 Wis. 361; and *Estrada v. Murphy*, 19 Cal. 249. In *Arguello v. Edinger*, *supra*, the action was ejectment, and the issue was whether a verbal contract of sale, with delivery of premises, could be set up as a defense thereto. In sustaining such a defense Justice FIELD says: "If, upon hearing the evidence, the court should determine that there was ground for relief, it would decree specific performance. If it should refuse the relief, it would call a jury to determine the issues upon a general denial." The case was tried, however, upon the general denials, the demurrer to the equitable defense having been sustained. This question of practice was not at issue, and the suggestion of the court was but *obiter*. In *Weber v. Marshall* the action was also ejectment, and the answer contained both legal and equitable defenses. Special issues involving the various issues, legal and equitable, were all submitted to the jury together, against the

objection of plaintiffs, who excepted thereto and saved their exception in the record. The court, by BALDWIN, J., say the submission of all these defenses to the jury was irregular; and add that if the equitable and legal matter is not kept distinct, confusion, embarrassment, and delay will ensue. They fail to say, however, that the doing so is more than an irregularity; and state with especial clearness that a new trial is granted for error in the decree based upon the findings of the jury. In *Lestrade v. Barth* the same issues in an action of ejectment were submitted, and FIELD, J., says that in *Weber v. Marshall* such practice was held to be irregular; but as no objection was taken in the court below, the irregularity will not influence the decision in the case at bar. In *Estrada v. Murphy* the practice does not seem to have been at issue, but Justice FIELD indicates that it should be, as he had done in *Arguello v. Edinger*. In *Harrison v. Juneau Bank*, 17 Wis. 350, an action involving the reformation of a contract, with issues both legal and equitable, submitted to a jury without objection, DIXON, C. J., says that the correct practice in such cases no doubt is to try the equitable cause first, and afterwards the legal; but as that practice was not adopted, we see no absolute impracticability in the course pursued.

To the expressions contained in the above authorities it is replied by respondents that the submission of special issues in cases essentially equitable is a matter of discretion with the court; that the findings of the jury thereon are simply advisory, and not binding upon the conscience of the court; and that the utmost doctrine of the adjudicated cases is that such a practice is but an irregularity, which has never been adjudged to be sufficient ground to reverse a judgment.

The doctrine of the advisory character of such a practice seems fully determined in *Basey v. Gallagher*, 20 Wall. 678. Justice FIELD there says, in a case in which the same practice was adopted as in the case at bar: "The court is not bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience, and not to control its judgment." In *Lestrade v. Barth* it is said that this practice is only adopted when the evidence is very contradictory and the question turns on the credibility of witnesses. The only reason given why this practice is not proper is that confusion, embarrassment, and delay may ensue. We are unable to see that any of these objections exist in the case at bar. In the only case (that of *Weber v. Marshall*) in which the practice has been actually adjudicated, it was held simply an irregularity not sufficient to justify a new trial. We have graver doubts of the expediency of submitting equitable issues to a jury at all than we have apprehension of confusion or delay in submitting both legal and equitable issues to a jury at the same time. We are of the opinion that the practice rests in the discretion of the court.

The appellants assign as error the giving of the following instruction:

"If it is clearly established, to the satisfaction of the jury, that the verbal understanding and agreement of the parties included all the ground lying north-easterly from the east tunnel, and that the same was omitted from the writing by mutual mistake, then the defendants made out a case entitling them to a reformation of the written lease to make it conform to the verbal agreement, and the jury should find on that issue accordingly."

This is claimed as error because it does not say that these facts should appear beyond a reasonable doubt. We cannot determine the correctness of an instruction by segregating it from the entire charge, and considering it alone. In the second instruction the court charged the jury that written instruments cannot be reformed upon a probability nor preponderance of evidence, but only upon a moral certainty of error. In the first instructions the jury are told that mistake must appear beyond a reasonable doubt. This is repeated in instruction No. 3. We think the charge is clear and explicit as to the doctrine of reasonable doubt.

The third alleged error is:

"The finding of the jury, adopted by the court, that the original verbal agreement for the lease included the ground in dispute, and that it was omitted by mutual mistake, is not supported by the evidence; and that there is no allegation of mutual mistake in the pleadings upon which to base such evidence or finding."

We think the allegations in the pleadings are sufficient to sustain the findings, and shall consider the sufficiency of evidence. This seems to be the important question in the case.

In reviewing the evidence we may be aided by segregating the admitted from the disputed facts. Mr. Ervin, the chief witness for the defense, one of the parties defendant, testifies:

"I am very familiar with the bill, [the *locus in quo*.] Have been around it three years. [Transcript, 164.] I first knew East tunnel in May, 1882, [T. 166,] [18 months before the lease was executed.] Austin had procured a lease which was not satisfactory to us with reference to the ground and the number of men. The ground I wanted was below discovery croppings, which was not included in the first paper. Before the lease was made I had examined only the surface ground. I was acquainted with the other side of the mountain, and tolerably familiar with lessee's tunnel. I asked Lewis to be allowed to work more men, and he said: 'I cannot do this. I have given you all you wanted. You may strike something where you would make \$100 a day,' etc. The restriction on the number of men was all that remained unsatisfactory at the time. Austin was gone five or ten minutes when he went with the paper."

I. I. Lewis, one of the plaintiffs, testified—

"That he gave a lease to Austin, one of the defendants, who after keeping it a week returned with it, and said his partners wanted more ground than was described therein. He [Austin] said they wanted the ground to the East tunnel. I made the erasures in the first paper, and interlined it to read: 'On a straight line from shaft No. 3 to mouth of East tunnel,' [as appears in the original lease.] I had copies made of the lease as amended. Austin went away, and on the next day returned with Ervin and Grant. Austin introduced Ervin to me. We signed the papers. Ervin remained a short time, and talked about the ground."

From this evidence, undisputed, we find that the plaintiffs were particularly anxious to limit the work of defendants to three men, and within a prescribed area; that the matter of the East tunnel as a limit was suggested by Austin, one of the lessees; that the original lease was in the possession of lessees for a week before it was altered; that Austin was familiar with the premises in which the mine was situated, and all of it; that Grant worked on the Elkhorn mine, of which the leased premises were a part; that after keeping the original lease a week, with every opportunity and motive to examine the ground, they had it reformed, extending the original limits; that at the time the reformed lease was delivered to them they were all present; that Ervin remained some time after he had received a copy as amended, and talked about the enterprise with Mr. Lewis; and that he and the other lessees had an opportunity and abundant leisure to examine its contents; and that after all this, as Ervin testifies, the restriction on the number of men was all that remained unsatisfactory at the time.

There is in the record much contradictory evidence. Mr. Lewis swears that the lease was read and compared by the parties, which Mr. Ervin fully denies. But without stopping to weigh conflicting evidence, and accepting the above testimony of Mr. Ervin as true, we may presume that he has omitted nothing which would be of benefit to the defendants' case.

It is argued that the conduct of the plaintiffs in paying money to the witness Grant, with the apparent purpose of hiring him to be absent at the trial, which purpose is not denied or explained by plaintiffs, together with the manner in which the affidavits upon which the injunction was granted were obtained, are presumptions against the plaintiffs' case sufficient to justify the finding of the jury. The sentiments of the court are entirely in accord with those expressed by the attorneys for respondents as to the reprehensible character of such practices. Fortunately for the reputation of the profession, we find no cases in the American reports where it has been necessary to consider the weight of this class of presumptions in the trial of causes, and we are glad to be able to say that no attorney or counsel of record connected with this case is responsible for such a necessity now. Best on Principles of Evidence (section 411) says that in the case of *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1430, in which the defendant caused the plaintiff to be kidnaped and sent to sea, and afterwards endeavored to take away his life upon a false charge of murder, one of the judges say that these facts spoke more strongly in proof of plaintiff's case than a thousand witnesses. The case was undoubtedly an aggravated one, and the doctrine stated with exceptional force. 1 Phillips on Evidence (volume 1, p. \*639) says: "Where a person is proved to have suppressed any species of evidence, the presumption will arise that if the truth had appeared it would have been against his interest, and that his conduct is at-

tributable to his knowledge of this circumstance." Apply this rule, and admitting that the evidence of Grant if present would have fully corroborated that of Ervin, we are of the opinion that the facts, as admitted by Ervin and corroborated by Grant, would not be sufficient to authorize the reforming of the lease. The fact that defendants were well acquainted with the ground, and had ample opportunity to know the precise language of the lease,—opportunities which they ought to have improved, if they did not,—leaves a doubt in the mind of the court, which they think is a reasonable one, that any mistake was made as to the terms of the lease or the premises described in it. In *Hearne v. Marine Ins. Co.*, 20 Wall. 490, the court say: "The party alleging mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt in the mind of the court as to either of these points; the mistake must be mutual and common to both parties. It must appear that both have done what neither intended." To the same effect are *Cox v. Woods*, 7 Pac. Rep. 722; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Wachendorf v. Lancaster*, 14 N. W. Rep. 316; *Fowler v. Adams*, 13 Wis. 459; *Lake v. Meacham*, Id. 355; 2 Pom. Eq. Jur. § 859; 1 Story, Eq. Jur. §§ 152-157.

The respondents argue that it being admitted that the apex of the ore body in dispute is within the area described in the lease, the lessees have the right to follow the vein outside their side lines into the disputed ground. After an examination of the authorities cited in support of this theory, we are of the opinion that the lease gives the defendants a license to remove ore from within the prescribed limits, and does not constitute a grant which authorizes the defendants to follow the vein outside of the area described in the lease.

The appellants urge that the fourth instruction was error, to-wit:

"If the jury find that Lewis told the lessees that their lease extended to the east tunnel, and the lessees so believing went to work therein with the knowledge of the plaintiffs, and developed an ore body; and that plaintiffs received their royalty from the ore sold therefrom; and that the defendants expended a large amount of labor thereon, so that at the time of the commencement of this suit there was ore of the value of ten thousand dollars on the dump extracted by them,—then Lewis and the plaintiffs would be estopped and prevented from claiming that the lease did not include the ground in the east tunnel."

The appellants claim that this instruction is error in that it fails to state that the party to be estopped must have had knowledge that his conduct or representations were false, and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly relied and acted upon the statement or act which is claimed to work the estoppel. We think the authorities clearly establish that this instruction is error. While under a mutual mistake, under the circumstances of this case, the interest of the defendants in the ore upon the dump at the time they received notice of the mistake would

probably be determined by the terms of the lease, yet we think the adjudicated cases would not extend the estoppel beyond that limit. *Brewer v. Boston, etc., R. Co.*, 5 Metc. 478; S. C. 39 Amer. Dec. 694; 6 Wait, Act. & Def. 683, 689, 703, 707, 714; *Morrison v. Caldwell*, 5 T. B. Mon. 426; S. C. 17 Amer. Dec. 84, 94; *McGarrity v. Byington*, 12 Cal. 431; *Stuart v. Luddington*, 10 Amer. Dec. 550, 552; *Finnegan v. Carraher*, 47 N. Y. 500; Herm. Estop. §§ 413, 415, 439; Bigelow, Estop. §§ 480, 531, 548; *Reynolds v. Mutual Fire Ins. Co.*, 6 Amer. Rep. 337; *Hefner v. Vandolah*, 57 Ill. 520; S. C. 11 Amer. Rep. 43; *Steel v. Smelting Co.*, 106 U. S. 456; S. C. 1 Sup. Ct. Rep. 389; *Brant v. Virginia Coal & Iron Co.*, 98 U. S. 326; *Corning v. Troy I. & N. Factory*, 40 N. Y. 203.

Judgment reversed and cause remanded for a new trial.

HAYS, C. J., concurring. BRODERICK, J., expressing no opinion.

## SUPREME COURT OF CALIFORNIA.

(88 Cal. 551)

PEOPLE v. NORTH PACIFIC COAST R. Co. (No. 11,298.)

Filed February 24, 1886.

**TAXES—COLLECTION OF TAX ON RAILROAD—DELINQUENT TAXES, INTEREST ON.**

In a suit to recover delinquent taxes assessed against a railroad operated in more than one county, under the Political Code of California, § 3670, on recovery of judgment by the plaintiff, it is not entitled to recover interest on the taxes at the rate of 2 per cent. per month from the time they became delinquent.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

*W. T. Buggett and James A. Waymire*, for appellant.

*W. H. L. Barnes*, for respondent.

BELCHER, C. C. This is an action to recover taxes assessed for the year 1883 upon the defendant's railroad, situated in Marin and Sonoma counties. The action was commenced under the provisions of section 3670 of the Political Code, and in the court below judgment was entered in favor of the plaintiff for the full amount claimed for taxes, with 5 per cent. added for non-payment and 10 per cent. for counsel fees and for costs. The appeal is by the plaintiff, and the only question presented for decision is, was the plaintiff also entitled to recover interest on the taxes at the rate of 2 per cent. per month from the time they became delinquent? The question is answered by the Political Code.

In 1883 an act was passed by the legislature amending sections 3664 and 3665 of that Code, and adding thereto other sections numbered consecutively up to 3671. St. & Amend. Codes 1883, p. 65. By these sections full provision is made for the assessment of all railroads operated in more than one county in this state, and the collection of the taxes levied upon such assessments. The assessment is to be made by the state board of equalization in the month of August, and within 10 days after the third Monday of that month the board is to apportion the total assessments to the counties, or cities and counties, in which the roads are located. The board must prepare each year a book, to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board; and another book, to be called "Record of Apportionment of Railway Assessments," in which must be entered, among other things, the total assessment, and the amount of the apportionment of such assessment to each county, and city and county. Duplicates of these two books are to be made and transmitted to the comptroller of state, and they "constitute the warrant for the comptroller to collect the state and county, and city and county, taxes levied upon such property assessed

by the board." Within 10 days after the fourth Monday in October the comptroller is required to publish a notice that he has received the "duplicates," and that the taxes are payable and will be delinquent on the last Monday of December, at 6 o'clock P. M., and that unless paid to the state treasurer, at the capitol, prior thereto, 5 per cent. will be added to the amount thereof. All taxes not paid before the time named are delinquent, and thereafter there must be collected by the state treasurer, or other proper officer, an addition of 5 per centum. After the first Monday of February of each year the comptroller is required to commence an action in the proper court, in the name of the people of the state, to collect the delinquent taxes, and the form of the complaint to be used by him is prescribed.

In the complaint it is alleged that the defendant is indebted to the plaintiff for state and county taxes in certain sums, "with five per cent. added for non-payment," and judgment is asked for the several sums named. If in such action plaintiff recovers judgment, there must be included in the judgment, as counsel fees, such sum as the court may determine to be reasonable and just.

In all of these provisions, as is seen, nothing is said about interest, and it is not claimed for appellant that they authorize the collection of interest. But it is urged that under section 3803 of the same Code interest at the rate of 2 per cent. per month on certain delinquent taxes may be collected, and that that section should be construed to apply to taxes such as are sued for in this action. We are satisfied that the section cannot be so construed. It refers only to the delinquent taxes mentioned in the sections immediately preceding it, and has no application to other taxes than those so mentioned. *Harper v. Rowe*, 53 Cal. 236; *Lake Co. v. Sulphur Bank Q. M. Co.*, 4 Pac. Rep. 876. If it had been intended that interest should be collected on all taxes which the comptroller might sue for and recover, the complaint, formulated by the legislature for their collection, would, in our opinion, have demanded judgment for that interest, as well as for the "five per cent. added for non-payment."

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(69 Cal. 33)

*In re COWDERY.* (No. 11,255.)

Filed February 27, 1886.

**ATTORNEYS AT LAW—DISBARMENT FOR UNPROFESSIONAL CONDUCT.**

An attorney at law who held the office of the city and county attorney for San Francisco, and had the management of all its cases, is guilty of unprofessional conduct, and violation of his oath as attorney and counselor at law, if, after his office has expired, he accepts a retainer in one of the city cases of which he had charge, on the side opposed to the city, though he perform no services for this retainer other than that he agrees not to disclose a point arising in the case, and within his knowledge, which would be favorable to the city and probably fatal to the suit of the other party.<sup>1</sup> MYRICK, J., dissenting.

In bank. Proceeding for disbarment of attorney.

*William Matthews, E. R. Taylor, and H. J. Tilden*, for prosecution.

THORNTON, J. J. F. Cowdery, at the times hereafter mentioned and prior thereto an attorney and counselor of this court, is accused as follows: That Cowdery was in December, 1881, the attorney and counselor of the city and county of San Francisco, and continued so to be up to the fifth day of January, 1883; that while he was such attorney and counselor he took appeals in the cases of *Bonnet v. City and County of San Francisco* and *Parker v. Same* from the judgments which had been given and made in each of said cases against the city and county, which appeals were pending at the expiration of his term of office; that after the expiration of his term of office, and in April, 1883, he informed one D. H. Whittemore, also an attorney and counselor of this court, that there was a point in each of said causes which would be fatal to the respondents if it was presented to this court; that thereupon Whittemore, in consideration that he would not disclose the point to his successor in office, and would not be retained by said city and county to represent it in either of said cases, paid to him \$100; that he agreed in consideration of such payment and promised Whittemore that he would not disclose to any person the point, and would not permit himself to be retained in either of said cases by the city and county; that he performed no professional or other services for this payment, and that it was not expected that he should; that at the time of the said agreement and said payment both Cowdery and Whittemore believed that said point if presented to this court would result in reversing the judgments above mentioned; that by reason of the foregoing Cowdery has violated his oath as attorney and counselor at law, and the duties imposed on him, and should be removed from his office as attorney and counselor.

In his answer Cowdery denies the following averments: That he ever told Whittemore that there was a point in either of the cases above mentioned which would be fatal if presented to the supreme court; that Whittemore, in consideration that respondent would not disclose such or any point to his successor in office, and would not be

<sup>1</sup> See note at end of case.

retained by the city and county to represent her in either of said cases, paid to him \$100; that in consideration of the payment of this sum of money he promised Whittemore, or any other person, that he would not disclose to any person any point in the cases, or either of them; that at the time of the agreement between him and Whittemore he (Cowdery) believed that the point alluded to would result in reversing the judgment in each or either of these causes.

On the issues joined the cause came on for trial in this court.

The statute of this state provides that "every person on his admission [as attorney and counselor at law] must take an oath to support the constitution of the United States, and the constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability.

\* \* \* Section 278, Code Civil Proc.

It is provided in section 282, Code Civil Proc., *inter alia*, that it is the duty of an attorney and counselor at law: "(1) To support the constitution and laws of the United States and of this state. \* \* \* (5) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

In section 287, Code Civil Proc., it is provided that "an attorney or counselor may be removed or suspended by the supreme court, or any department thereof, or by any superior court of the state, for either of the following causes, arising after his admission to practice: \* \* \* "(2) \* \* \* Any violation of the oath taken by him, or of his duties as such attorney and counselor."

The duties of an attorney and counselor at law spring from his obligations, and those obligations are defined and limited by law. One of the principal obligations which bind him is that of fidelity, under all circumstances, to his client; the maintaining inviolate the confidence reposed in him by those who employ him; and, at every peril to himself, to preserve the secrets of his client. Section 282, Code Civil Proc. This obligation is a very high and stringent one. If it is ever relaxed it is under exceptional circumstances, which rarely occur. If relaxed without the consent of the client, it is of most infrequent occurrence. The public is interested in the strict maintenance of this obligation, for without it there can be no assurance that the duties which devolve upon such officials as ministers of justice will be properly discharged. It is essential to the administration of justice, and of the respect which the tribunals for its administration should command; that these officers should discharge with the highest fidelity, and with the utmost good faith, the responsible duties which devolve on them.

The following facts are, in our opinion, established in the cause:

The respondent in December, 1881, entered upon the discharge of his duties as attorney and counselor for the city and county of San Francisco, having been elected to that position at an election held a short time before. He continued to be such attorney until the first

Monday in January, 1883, (fifth of that month,) when his term expired. When he went into office there were a large number of cases pending, (some 800,) in which the city and county was a party, involving street work, and which were in his office; that he was unable to make himself acquainted with the merits of all these cases during his one year's incumbency; that he was not acquainted with the two cases whose titles are given above; these two cases were pending when respondent took office; they had been tried in the court below, and judgments had been rendered against the city, and motions for new trials had been made and denied; that he knew nothing of the facts or law points involved in them, but determined to appeal them as a matter of official care and caution, and directed his assistants to appeal all cases to this court which were in a condition to be appealed; that the two cases aforementioned were, with others, so appealed, and the transcripts brought up to this court; that in December, 1882, D. H. Whittemore called on him, and asked him to stipulate to advance these causes on the calendar of this court; that he refused to stipulate, saying that he did not wish to hamper his successor, who would in a few days come into office; that he never knew at any time anything of the testimony or of the questions of law or fact involved in the cases, and had never read the transcript, and knew nothing of the testimony in either of these cases; that in a report sent to the board of supervisors, and signed by him as such attorney and counselor, these cases were mentioned as pending in the supreme court; but though this report was signed by him, he had never read it, and did not know its contents. On or about the twelfth day of April, 1883, he met Whittemore on Montgomery street, in the city of San Francisco, and had a conversation with him.

The supreme court on the tenth of April, 1883, affirmed the judgment in the *Bonnet* and *Parker Cases* above mentioned. Respondent was aware of this when he had the conversation with Whittemore on the twelfth of same month. He said to Whittemore: "Hello! You have won your *Parker Case*. Now you have won your case, how are you going to get your money? Does not the *Brickwedel* decision cut you off?" He said he would see about getting his money, and I said: "Whittemore, did they raise the point on you that I raised in the *Blum and Lieu Case*,—that there was not sufficient allegation of presentation of claim to the board of supervisors before suit." He said: "No; there is nothing in that point any way. The supreme court has decided it twice in the *Gurney* and *Parker Cases*, and I care nothing about it. If there is, there could only be a delay for a new trial; it is nothing on the merits. As a matter of fact, the complaint alleged presentation and rejection by the supervisors, and the court had found in both cases that the claims had been presented and rejected." After some remarks about one Sam Davis buying the judgments, he (Whittemore) said to him: "Are you in a position to accept a fee in this case?" to which respondent replied: "Yes; I have had nothing to do

with the cases, and know nothing about them, and had not been employed by the city, and I thought I was in a condition to accept a fee." Respondent said at the same time: "Mr. Whittemore, I can do nothing against the city in this case, and I do not want, for appearance sake, to be consulted in them." He (Whittemore) said he did not want him to do anything in the case. All that he wanted was that he should not be employed against him. Respondent said: "All right. The city had not attempted to employ me, and she had got other counsel, and that I would accept \$100." On the same day the next this money was sent by Whittemore to respondent. After this employment Cowdery had nothing further to do with the cases. He offered to give any information to his successor, Craig, about any cases in his office. Isaac N. Thorne had the management of these and other street cases as an assistant to Cowdery, and Thorne was directed to give all information about these and all other cases in the office to Craig. It does not appear that any information was ever given to Craig by either of them in relation to the *Bonnet and Parker Cases*. Respondent was a salaried officer of the city and county, and received all the salary due him. He was furnished with assistants, who also were paid salaries during their employment as assistants.

It is contended that Cowdery violated his duty as attorney and counselor in accepting this employment from Whittemore in the *Bonnet and Parker Cases* after having had control of them as the attorney and counselor for the city; that having been the attorney and counsel of said city while the causes were pending, he could not accept any employment in regard to them which would put him in a position hostile to his former client. On the other hand, the contention is that Cowdery having acquired no knowledge of the facts, and received no confidential communications from his client in the cases after the expiration of his term of office, he was at liberty to be employed by the adverse party.

The questions arising on these contentions have been elaborately argued, and are before us for decision.

The case of *Cholmondeley v. Clinton*, 19 Ves. 261, S. C. 1 Coop. 80, is cited on behalf of respondent. In this case a motion was made by defendant for an injunction restraining the plaintiff, Earl Cholmondeley, from employing William Montriou as his solicitor in the action above entitled, or as his attorney or solicitor in any other suit in equity or action at law commenced, or to be commenced, by Earl Cholmondeley against Lord Clinton, in respect of any estates or property the title whereof came to the knowledge of Montriou as the clerk of William Seymour, one of the defendants, while he was the attorney and solicitor of the defendant, Lord Clinton, or which came to the knowledge of Montriou as solicitor for Lord Clinton while in partnership with Seymour, or with Seymour & Squibb; and also restraining Montriou from acting as solicitor or attorney for plaintiff in any suits or actions, and from communicating to the plaintiff, his

counsel, solicitors, attorneys, or agents, any information relating to the matters in dispute in such suits or actions which has come to the knowledge of Montriau as clerk to Seymour, or as solicitor to Lord Clinton, as above mentioned. It appeared that Montriau had been clerk with Seymour and afterwards his partner. Subsequently Squibb was taken into the partnership. During the period that Montriau was clerk for Seymour the latter was solicitor for Lord Clinton. While the partnerships existed he and Seymour, and subsequently he and Seymour & Squibb, were solicitors for Lord Clinton. In 1812, during the period above mentioned, the bill in this suit was filed to recover considerable estates of Lord Clinton, in the counties of Devon and Cornwall, claimed by the plaintiff; and Montriau, while clerk and partner with Seymour, became intimately acquainted with the affairs and property of Lord Clinton, and the titles of the estates, the subject of the suit, preparing abstracts, deeds, etc., relating to them, and Seymour conferred with him upon the title and the defense. The answer was prepared in 1812. The partnership was dissolved some time in 1813 as to Montriau, who in December, 1814, communicated his appointment to be solicitor to the plaintiff, Earl Cholmondeley, for conducting his suits against Lord Clinton.

It was stated in the affidavits of Seymour and Squibb, and two of their clerks, that Montriau, as such clerk and partner, acquired such information touching the titles, estates, and affairs of Lord Clinton, and his defense, etc., as would, in the judgment and belief of affiants, render his being concerned in the management of the suit as solicitor for the plaintiff highly prejudicial and injurious to Lord Clinton; and they could point out particulars did they not believe that they should thereby produce great part of the mischief which the application for an injunction was intended to avert. Montriau's affidavit stated that he was never consulted confidentially by Lord Clinton, while Seymour was; that Seymour had the whole management and control of the case; all letters were confidential, and addressed to him; and all deeds, papers, etc., relating to the estates were collected by Seymour, in 1812, and secured in his private office. He admitted his acquaintance with some of Lord Clinton's affairs. When he was clerk he revised an old abstract relating to the estates in question, but did not recollect that he prepared any deeds, etc., or that Seymour conferred with him on the title further than by informing him of plaintiff's claim and the objection on which it was founded; admitted that he was well acquainted with the abstract of defendant's title, which does not contain any deed or statement not appearing on the pleadings; that the application to become plaintiff's solicitor came from plaintiff's agent. He denied that he possessed any information acquired as clerk or partner that would, in his judgment or belief, render his being concerned for plaintiff highly prejudicial to the defendant; and stated that the treaty for the dissolution of partnership commenced and was concluded very soon after Lord Clinton appeared to the bill in No-

vember, 1812. It was admitted that one stipulation in the articles of dissolution was that Montriou should not act as solicitor for Lord Clinton. In deciding the case the lord chancellor discussed many points regarding the relation of attorney and client, and closed his opinion as follows, as reported in 19 Ves.:

"Upon many of the grounds that have been agitated, I shall not give any judgment. I shall decide this case upon the dry question whether this plaintiff has a legal right to employ Mr. Montriou, and whether he has a legal right to accept that employment. With regard to the propriety or delicacy of conduct I do not sit in this place to communicate my opinion upon such subjects; and therefore shall follow the example of Lord THURLOW, who, upon a question as to the interest of a debt, which a noble lord then sitting by him admitted he ought to pay, said he should decide only on the legal right; desiring that the arguments of propriety and delicacy, submitted to him as lord chancellor for his legal judgment, should be addressed to that noble lord himself. So I shall refer the arguments addressed to me upon those motives of propriety and delicacy to the plaintiff and Mr. Montriou, and shall consider only the dry question whether the attorney of the plaintiff, being removed, not by the discharge of the plaintiff, can, in that very cause in which he had been employed by him, become the attorney for the defendant. That depends upon a principle applying to cases both in this court and at law, upon which I shall soon have an opportunity of consulting the judges, and will then give my opinion on that question of law; again disavowing a right to give my opinion upon any other view of this case."

"The lord chancellor," on a subsequent day, "declared the unanimous opinion of all the judges and the barons of the exchequer; the master of the rolls and the vice-chancellor agreeing with his lordship that an attorney or solicitor is not at liberty to act in the manner proposed by Mr. Montriou; and that, having thus left the cause, he is not in the situation of a solicitor discharged by the client, and therefore cannot become the solicitor for the other party in the same cause." 19 Ves. 275, 276.

The report in 1 Coop. 80, is substantially the same, but in stating the result of his consultation with the law judges he used this language:

"His lordship this day stated that he had requested the chief justices of the courts of king's bench and common pleas, and the chief baron of the exchequer, to inform him of the opinions of their respective courts upon the above point; that he had been informed by Lord ELLENBOROUGH and Lord Chief Justice GIBBS that the opinions of their two courts were that an attorney could not be allowed so to act; that he had also spoken to the master of the rolls and the vice-chancellor, and that they concurred in the opinion; but he had not yet been able to learn the opinion of the court of exchequer, which, however, he would communicate as soon as he received it."

February 3, 1815: "This morning the lord chancellor informed the counsel in this cause that since the subject was last mentioned he had received from the lord chief baron of the court of exchequer the opinion of that court, which was that no solicitor who had been employed as such on one side could afterwards be employed on the other. His lordship stated that the opinion of all the courts and judges he had communicated with also was that Montriou did not stand in the situation of a discharged solicitor. He added that he should say no more in judgment upon the motion, as Montriou had been advised by

counsel that he might become the solicitor of the plaintiffs in the cause, and had acted upon that advice, believing it to be right." 1 Coop. 88, 89.

In this case Lord ELDON decided, and intended to decide, but two points: *First*, that a solicitor who had been employed as such on one side of a cause could not afterwards, having voluntarily quit the cause, be employed on the other; *second*, that Montriou did not stand in the situation of a discharged solicitor.

In *Robinson v. Mullett*, 4 Price, 353, a solicitor had acted, to a certain extent only, for parties defendant in an amicable suit in chancery to procure the opinion of the court upon the construction of a will. In that cause one of the defendants in this case was plaintiff, and the plaintiffs in this case with others (residuary legatees and executors) were defendants. All the defendants in the chancery suit employed the same solicitors to put in their answers. In consequence of disputes afterwards arising between the parties, the plaintiffs in this suit filed their bill against the executors and other parties to have the trusts of the will executed, and for an injunction and receiver, and employed the solicitors who had been employed by themselves, the executors, and the other parties in the suit in chancery to prosecute the suit. An application was made to restrain the solicitors from acting for plaintiffs in this suit, etc. It appeared from the deposition of the solicitors sought to be restrained that they were not in possession of any secrets of defendants, or any information whereby their interests could in the slightest degree be prejudiced; that all communications made by defendants to them had been made in the presence of plaintiffs, or subsequently related to them by defendants. "The court held that the employment of these solicitors for the present plaintiffs by such of the defendants as they had acted for in that suit, and to such an extent only, was too slight a ground for the application to restrain them from acting in this cause, as there did not appear to have been any important confidential matters disclosed to them the knowledge of which might be used in prejudice of the party so applying." The court discharged that part of the order only. The order which had been obtained on the part of the executors restraining these solicitors from acting as attorneys or solicitors in any other suit in law or equity between the parties was allowed to stand. In this case it will be observed the former suit was amicable—one to procure the construction of a will; the solicitors had been engaged for all the defendants; that no important confidential communications were made to them; and that all communications made to the solicitors were made in the presence of the plaintiffs, or subsequently stated to them by the solicitors. The restricted relief granted will also be observed, and an important part of the order of the court was not set aside by the court.

In *Bricheno v. Thorp*, Jac. 300, Lord ELDON refused to restrain one Day, who had been clerk for the solicitor of the plaintiffs (himself one of the plaintiffs) when the action was commenced, from act-

ing as solicitor of defendants, on the ground that it did not appear that he had become possessed of any information while he was clerk which could be prejudicial to the plaintiffs. The court said that the general allegation that he had become possessed of such information, without pointing out the particular information acquired, was not sufficient. But in deciding the cause the court said :

"There may be cases where the mischief which the case of *Cholmondeley v. Clinton* was intended to counteract may equally occur in the case of a clerk. On the other hand, the case may be of such a nature that, though the clerk may be retained for the opposite party, it may be impossible for any information he possesses to do any mischief. But if he is to carry important secrets out of the office, and employ them in the service of others, though I feel that it may operate to the detriment of young gentlemen setting up in business, yet I think that ought not to be permitted. I ought, therefore, to be informed of the nature of the suit, and wish to see the bill and answer. A gentleman going into business for himself must not carry into it the secrets of his master; but, on the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honorably take." Jac. 301, 302.

It should be observed that this was the case of a clerk afterwards setting up in business as a solicitor. The lord chancellor remarks on this circumstance as distinguishing the case from *Cholmondeley v. Clinton*, *supra*. If it had appeared that he had acquired any information which might be prejudicial to the plaintiffs, the court would have restrained him. In this case Lord ELDON required that the particulars of the information acquired by Day, as clerk, should be pointed out to him, not publicly, on the papers. This was not done, and therefore he refused the order.

In *Beer v. Ward*, Jac. 77, the same court refused to restrain a solicitor from giving evidence of confidential matters in another court, on the ground that the question should be left to the court before which he might appear as a witness. Pages 79, 80. As to restraining a solicitor from making communications of confidential matters to individuals the court said: "You must show me what has been done; for I could not interfere to restrain in this case, any more than in cases of waste, unless something has been done which ought not to have been done." For lack of such showing the restraint as to making communications to individuals was refused.

In *Davies v. Clough*, 8 Sim. 262, Jones had been employed as solicitor for Mrs. Clough in the negotiation of an agreement by virtue of which £3,160 was paid to her. Disputes afterwards arose between Jones and his client as to his bill of costs, which she procured to be taxed, and it was reduced. Jones afterwards filed a bill against Mrs. Clough as solicitor for other parties to set aside this agreement. The court restrained him from so acting, and also from communicating any information relating to the agreement that had come to his knowledge confidentially as solicitor for his former client.

In *Grissell v. Peto*, 9 Bing. 1, the court refused to restrain attor-

neys from acting in a cause for defendant on the ground that they had obtained a knowledge of the plaintiff's case in the course of a chancery suit in which they had been acting in conjunction with plaintiff, and in which defendant had no interest, but in which they had acted for the defendant. The attorneys deposed that they obtained little more information than would have been furnished by plaintiff's bill of particulars. Two of the judges remarked that a case of this sort might occur in which the court would think it right to interfere. Let it be observed here that the information in this case was obtained, not in the case before the court, but in another suit in another court. Yet, under such circumstances, two of the learned justices intimate that a case might occur in which it would be right for the court to restrain.

*Johnson v. Marriott*, 4 Tyrw. 78; S. C. 2 Crompt. & M. 183; and 2 Dowl. Pr. 343, is also cited. The reports agree as to the point on which the motion was decided. The point for decision arose on a rule *nisi*, calling on defendant to show cause why an order of BAYLEY, B., appointing Cyrus Jay attorney for defendant, should not be set aside, and Jay be restrained from acting as attorney for the defendant in the cause above named. In the report in Tyrwhitt it is stated:

"From affidavits of the present attorney for the plaintiff and his clerk it appeared that in May, 1832, Jay had been appointed attorney to the plaintiffs as assignees of Cochrane, and as their attorney had commenced this action in their names to recover goods of the bankrupt which had been taken in execution. His bill of costs showed that he had delivered the issue, made two copies of the pleadings for briefs, had conferences with the bankrupt, given notice of trial, and taken the opinion of counsel on all the facts of the case. Afterwards, and before the trial, he was discharged by the plaintiffs, who now swore to their belief that he was fully acquainted with all the circumstances of their case, and that the defendant's employing him would injure the plaintiffs."

Three of the judges gave opinions. BAYLEY, B., rested his judgment on the circumstance that the clients, the assignees, (plaintiffs in the case,) made no affidavit. He said:

"But the chief foundation of my opinion here is that the clients, the assignees, make no affidavit. The attorney here having been in the first instance concerned for them, they know and can best tell whether they made confidential communications or not to Jay which it would be material that he should not disclose to the defendant. But no such matter is sworn to by either of them or their solicitor. It has been argued that the case drawn and submitted to counsel for his opinion must have conveyed such information to Mr. Jay. If that were so, the affidavits should have stated that it did contain facts necessary to be kept from the defendant's knowledge in order to prevent injury from accruing to the plaintiffs by the disclosure. If the assignees had sworn that they had made communications to Mr. Jay of that essential importance that if disclosed to the defendant they, as plaintiffs, would be materially prejudiced in their suit, I should have hesitated to discharge this rule, and to suffer Mr. Jay to act for the defendant; but as no assignee or creditor states that a single material fact was communicated to Jay, and the application is rested solely on the affidavits of the plaintiffs' present attorney and his clerk, whose conclusions of the amount of Mr. Jay's knowl-

edge of the facts are drawn from his bill of costs, I am of opinion that no sufficient case is established upon which the court can make this rule absolute." 4 Tyrw. 82, 83.

BOLLAND, B., said:

"I agree with my Brother BAYLEY, and for the same reasons. We are here to decide on the rights of three parties, viz.: of the defendant, who seeks to employ Mr. Jay as his attorney; of Mr. Jay, whose interest is concerned in that employment; and of the plaintiffs, who wish to restrain the defendant from having Mr. Jay's services on this particular occasion. Now the affidavits disclose no facts sufficiently strong to warrant us in exercising our power to restrain him from acting as attorney to the defendant. The only fact on which his so acting is objected to by the plaintiffs is that he has been before employed by them in this case, and afterwards discharged by them, but without any imputation of misconduct. Now, in *Cholmondeley v. Clinton*, Lord ELDON, after consulting all the common-law and equity judges, seems to have been of opinion that a solicitor discharged by his client for any reason other than misconduct is differently situated from a solicitor who has withdrawn voluntarily from the cause in which he had been employed, and that he was therefore clearly at liberty to employ his talents and exertions for the opposite party; though if he afterwards communicated to the latter the secrets of his former client, or in his new employment improperly used that knowledge of them with which he had been confidentially intrusted by his original client, so as to injure or prejudice him, the court might interfere to punish him for so doing. But no facts are here disclosed to warrant the interference prayed for by this rule." Id.

GURNEY, B., said:

"I concur, but I do not say that if an attorney conducted himself so as to procure his client to discharge him a court would not restrain him from acting for the opposite party, and consider his discharge to have been in truth his own act; but in the present case the plaintiffs have not shown in their affidavits that Mr. Jay was acquainted with any confidential communication made by them, the acting on which by Mr. Jay for the defendant, or the disclosure of it by him to the defendant, might prejudice them in the action." Id.

The case manifestly was ruled as it was for want of evidence. It was assumed that it was incumbent on plaintiffs to show that the attorney, Jay, had received confidential information from them which it would be to their prejudice that Jay should disclose or use. BAYLEY, B., said that this must appear by the affidavits made by the clients. BOLLAND, B., agreed with BAYLEY, B., "*and for the same reasons.*"

Nothing was assumed or presumed as to Jay's acquiring any knowledge of the case from the fact that Jay was employed by the plaintiffs in the cause, and that his bill of costs showed that he had delivered the issue, made two copies of the pleadings, given notice of trial, and had taken the opinion of counsel on all the facts of the case. As to the case submitted to counsel for an opinion, BAYLEY, B., laid it out of consideration, because the affidavits did not state that the case contained facts necessary to be kept from defendant's knowledge in order to prevent injury from accruing to plaintiffs by the disclosure; and this though the affidavits of the then attorney and clerk stated that Jay had taken the opinion of counsel on *all the facts of the case*.

The opinion seems to have been placed to some extent on *Bricheno v. Thorp*, which was a case where it was averred, in a general way, that the solicitor ought to be restrained because while clerk he had acquired knowledge of confidential matters which it would be injurious to the plaintiffs to be disclosed. This circumstance is relied on by Lord ELDON in his judgment, and for that reason he required the particular facts to be pointed out to him (not publicly) of which the solicitor had acquired knowledge while clerk; and this manifestly for the reason that a clerk does not always become possessed of the facts confidentially communicated by a client to his employer. This is otherwise of a solicitor or attorney, with whom the client always confers. BAYLEY and BOLLAND, BB., both state that Lord ELDON, in *Cholmondeley v. Clinton*, seemed to be of the opinion that if Montriou had been discharged by Lord CLINTON he could have been employed by the plaintiff. We do not think anything said in the opinion by Lord ELDON justifies such a conclusion. He expressly declined to decide the point,—merely mentioned it among the facts of the case that Montriou did not occupy the position of a solicitor discharged by his client; and in *Bricheno v. Thorp*, in referring to the case of *Cholmondeley v. Clinton*, Lord ELDON said: "If Lord CLINTON had discharged the gentleman, and would not continue to employ him, on such a case no opinion was given." Jac. 303. In the report of *Cholmondeley v. Clinton*, 1 Coop. 88, he asks this question: "But even if an attorney is discharged, can it be that his having been so discharged by one party shall be the very reason why the other party shall employ him?"—but does not decide it. The points determined in the *Cholmondeley Case* have been stated above, and are, we think, stated accurately.

We do not see that *Jackson v. State*, 21 Tex. 668, has any application to this case. The portion of the opinion in that case referred to and quoted in the brief of counsel has only reference to the special verdict in the case and its insufficiencies.

The cases above cited do not hold that an attorney or solicitor, when discharged by his client, though he may be employed by his adversary, can make use of the secrets in relation to the cause obtained from his former client. On the contrary, we understand the cases to hold that a court would restrain an attorney or solicitor from such conduct, and if he could not be otherwise restrained, it would punish such betrayal of confidence by striking him from the roll. In *Johnson v. Marriott* the court refused to act from lack of evidence. If the evidence had been sufficient, would not the defendant have been restrained? We are of opinion that the court in that case would have restrained him, even when he had been unjustly discharged, and he was allowed, as contended, to be employed by the adversary party. The law secures to the client the privilege of objecting at all times and forever to an attorney, solicitor, or counsel from disclosing information in a cause confidentially given while the relation exists. The

client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law. *Wilson v. Rastall*, 4 Term R. 753; *Vaillant v. Dodemead*, 2 Atk. 524; *Sandford v. Remington*, 2 Ves. Jr. 189, note. The cases cited on the other side are *Wilson v. State*, 16 Ind. 392; *Price v. Railroad Co.*, 18 Ind. 137; *Herrick v. Catley*, 1 Daly, 512; *White v. Haffaker*, 27 Ill. 349; *Gaulden v. State*, 11 Ga. 47; *Valentine v. Stewart*, 15 Cal. 387-401; *People v. Spencer*, 61 Cal. 128.

In the Indiana cases the attorney became acquainted with the facts of the case while acting as such, and it was held that he should not be allowed to change sides, and after having acted for one party in a suit to act for his adversary. In both cases the judgment was reversed on the ground above indicated. One of these cases was a civil action, the other criminal. In the case in 16 Ind. the defendant objected to the attorney (Mr. Flagg) assisting in the prosecution of the case, and filed his affidavit, stating, in substance, that "he had employed Flagg to defend him against said charge, executed to him his notes for \$250, and disclosed to him the facts in the case and the evidence for his defense;" that after the return of the indictment Flagg had informed him that he would not act further as his attorney, and had delivered up his notes. Flagg stated by affidavit that he had been desired by defendant to act as his counsel, who stated to affiant that the prosecuting witness and her husband did not desire his services, and on that ground he consented to act; but having subsequently learned that said persons had desired and did then desire his services, and had sent word to him to that effect, he declined to act for defendant, "and returned to him the notes he had received from him for services; that he has received no compensation from defendant, and has not, to his knowledge, learned anything from defendant as to his grounds or means of defense." The objection of defendant was overruled, and Flagg was permitted to assist and did assist in the prosecution. The supreme court observed as follows:

"In searching for the reason upon which a conclusion rests we are often led to consider the results which might flow from the maintenance of an adverse conclusion. For instance, in the case at bar, if the ruling of the court below, and the conduct of Mr. Flagg as an attorney and officer of that court, should be sanctioned as legal, we are constrained to believe that the positive tendency of such ruling would be to defeat the very purpose for which the court was organized, namely, the administration of justice; and if indulged and continued in courts, and the officers thereof, will necessarily result in sapping the foundations of the temple of justice. With what confidence could one arraigned upon a charge of crime confer with his attorney, or reveal to him his evidence, and thereby prepare for his defense, if that officer is permitted, after thus acquiring such knowledge, to change their relative positions, and, instead of standing up as his defender, to stand forth as his accuser. Would he not consider it better to stand mute, dumb, as the sheep before the shearer, rather than disclose the evidence which might thus be turned against him? He might, perhaps, truthfully believe it more to his

interest to return to the practice of a semi-barbarous age, when the prisoner was not heard in his defense by counsel or witnesses in his behalf, than thus to have the weapons of his defense turned against him by those in whom, by the acknowledged law and the statute, he had a right to confide." 16 Ind. 395.

In the case in 18 Ind. the question is stated and decided as follows:

"The next question is upon the refusal of the court to exclude James M. Flagg, Esq., from acting as attorney for the plaintiff in the suit, the one then pending being the second trial of the cause. This cause, as we have seen, was commenced in 1855, and was first tried below in 1856. It came to the supreme court, where the judgment below was reversed, and the cause remanded for another trial. The second trial, from which record the pending appeal was taken, was had in 1860. On the first trial Mr. Flagg acted as attorney for the defendant under the following circumstances: Mr. Price, the defendant, had employed Mr. Ellison, to whom alone he was willing, it seems, to trust his cause; but other persons interested in the question employed Mr. Flagg to act as associate counsel with Mr. Ellison for Mr. Price, in his defense. Mr. Price accepted the services of Mr. Flagg upon these terms, treated him as his attorney, consulted with him fully upon his defense, and Mr. Flagg participated, on the trial, in the examination of the witnesses and the argument of the cause. Beyond doubt, in this state of facts, he is to be regarded as having been the attorney of Mr. Price equally as though he had been feed by him. How he came to take a fee from the plaintiff, on the second trial, does not appear. And now the question arises, can an attorney accept fees on both sides of the same cause? for, though the trials were different, the cause was still the same. On this point there is but one opinion. Says Prof. Sharswood in his *Legal Ethics*: 'The criminal and disgraceful offense of taking fees of two adversaries ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics.' 'A pleader is suspendable when he is attainted to have received fees of two adversaries in one cause.' *Mirror Just. c. 2, § 5*. Where an attorney has, in the course of other business or in conducting other suits, obtained a knowledge of matters connected with the suit in question, courts will not, in general, simply on the fact of such knowledge, restrain an attorney from acting against the party through whose business he obtained such knowledge, especially where such party does not desire his services; but he is never allowed to change sides in the same suit. 1 Mon. Pr. 182. See, also, *Wilson v. State*, 16 Ind. 392; *Henry v. Raiman*, 25 Pa. St. 354. And see 1 Selw. N. P. (7th Amer. Ed.) 165, for a large collection of cases relative to attorneys at law." 18 Ind. 140, 141.

In the case from 1 Daly it is held that an attorney cannot serve professionally both parties to a controversy; and where he has been retained by one he cannot recover for professional services rendered in the same matter to the other. The court made these remarks in the case:

"While the relation of attorney and client continued between the plaintiff and the defendant's wife he could not enter into an agreement to act also as the attorney of the husband in a matter so directly connected with the subject of his employment as that of effecting a reconciliation and settling the matter in difficulty between them. He had been employed by the wife to procure a separation, and could not, therefore, engage to act for the husband as his attorney in preventing it. In other words, he could not act on both sides. An attorney, said Chief Justice HOBART, oweth to his client fidelity,

secrecy, diligence, and skill, and cannot take a reward on the other side, (*Yardly v. Ellill*, Hob. 8a; Toml. Law Dict. 'Attorney;') and in *Shire v. King*, Yelv. 32, and *King v. Shore*, Cro. Eliz. 914, it was held that he cannot deal upon both sides, except as an arbitrator." 1 Daly, 514.

In *White v. Haffaker*, 27 Ill. 349, it was held that a solicitor in a case cannot act as a special master to execute the decree. See remarks of court as to relation of client and attorney on page 351, 27 Ill.

In *Gaulden v. State*, *supra*, it appeared that Gaulden, when solicitor general of the district, had, at the April term, 1851, draughted the indictment against James Cody and Patrick Cody for a misdemeanor, upon which the issue for trial was formed; that he consulted with the assistant counsel, and was cognizant of the facts of the case. The case came on for trial at the December term, 1851, when Gaulden appeared as one of the counsel for defendants, and requested his name to be marked upon the docket. It also appeared that the solicitor's fee for drawing the indictment had been allowed by the court, but had not been paid, because there was no fund on hand to pay it. The counsel for the state objected to Gaulden's appearing as counsel for defendants, and the court excluded him. This was assigned for error. The supreme court in its opinion remarked as follows:

"The question made in this case is whether a solicitor general who, in his official capacity, has drawn an indictment against a defendant or defendants, and prosecuted the same as counsel for the state, can be permitted, after the expiration of his term of office, to take a fee from the defendant or defendants in such indictment, and appear as his or their counsel, for the purpose of defending him or them, on the trial for the accusation contained therein. \* \* \* It is urged in behalf of the former solicitor general that in his official capacity he must be considered as standing indifferent between the people of the state and the defendant who is indicted; that when his successor has been elected and qualified the state is to be considered as having *discharged* him from her service, and therefore he is at liberty to appear as counsel for the defendants whom he prosecuted while in office. Admitting that in his *official* capacity he is supposed to stand indifferent, so far as his personal feelings are concerned, yet he is not the less the counsel for the state on that account, and must necessarily become familiar with the facts of the case upon which the state relies for a successful prosecution of the indictment. His position as the counsel for the state enables him to learn the difficulties which may stand in the way of the conviction of one who is really guilty, which no other person would be as likely to know, for the reason that his communication with the prosecutor, the witnesses, and the grand jury affords him the means of ascertaining many facts which only those who are *officially* connected with the government can know. Should he be permitted to make use of the privilege thus officially conferred upon him while in the discharge of his duties as counsel for the state, for the purpose of defending those who have been accused of crime during his official term of office, and that, too, for a reward paid by them to him for such service? \* \* \* Neither can the solicitor general, on the expiration of his term of office, properly be considered as having been *discharged* by the state. The contract between him and the state is that he will perform certain duties enjoined by law for a specified term of time, for a stipulated compensation. Upon the expiration of the period of time for which he was elected, he is out of office, by the *express*

*terms of the contract.* The state does not discharge him, but his term of service expires by the express stipulation of the contract made between himself and the state; and hence the want of any analogy between such a contract and a contract with a private citizen for professional services, who discharges his counsel from his case before the termination of the suit in which he is employed. The administration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object; and, in our judgment, *public policy* most emphatically demands that a solicitor general who has been employed by the state to prosecute defendants for a violation of her laws, for the compensation fixed by law, should not be allowed to defend such defendants from the charge contained in the indictment, after the expiration of his term of office, for a compensation to be paid by them for that purpose. Such a practice will have a tendency to greatly embarrass the administration of the criminal law; for as the term of the office of solicitor general is about to expire, prosecutors, and others who may be intrusted to prosecute offenders, will necessarily be restrained from communicating freely with the state's counsel when he may be employed at the next term of the court to defend the indicted culprit. It is no sufficient answer to say that the law will not allow him to disclose any fact, which may have been communicated to him as the counsel for the state, to her prejudice. If he *knows* the vulnerable points in the case, derived by his official connection with it, there are many ways by which those points might be made available to the defendant, on his trial, by his counsel, besides disclosing them as a witness. If he has knowledge of facts, derived from his official connection with the prosecution, which will operate to the prejudice of the state, and he is permitted to act as counsel for the defendant, that knowledge will be made available in the defense; therefore we place our judgment on the ground that public policy forbids a solicitor general, who has prosecuted a defendant for a violation of the law by preferring an indictment against him, should appear as his counsel to defend him from the charge after the expiration of his term of office." 11 Ga. 49-51.

The supreme court of Georgia affirmed the ruling of the court below.

*Valentine v. Stewart, supra*, was an action to enforce the specific execution of an agreement. The court below, on the trial, dismissed the action on the ground that the agreement was in contravention of public policy and void, and this court affirmed its action. The agreement was to withdraw certain depositions taken before the United States land commission to settle private land claims in this state, taken to defeat a claim as fraudulent, (see 15 Cal. 398-400,) and an attorney, who the court held was in reality an attorney for the United States, was one of the parties so contracting. The court used this language:

"He [speaking of the attorney] had, as counsel for the government, been put in possession of the case of the government; had taken testimony in the name and as agent of the government. The object and the intended effect of this testimony were to defeat the claim; he could not afterwards, in consistency with the position, render any assistance to White and Stewart to maintain the claim. The obvious consequences of such a principle would be to encourage the intermeddling of attorneys in claims of this sort, and then, having got full information and knowledge of the case, proceed to dispose of that knowledge for their own profit to the other side. The true rule is that an attorney, when acting for his client, is bound to the most scrupulous faith,

—*uberrima fides*. His own interests, for wise reasons, are not allowed to be brought in collision with the interests of his client. There can be no antagonism between these parties as to the matters of this delicate agency; the attorney is simply the representative of his client,—not his rival or competitor,—acting for the principal, not for himself. Very little knowledge of human nature is required to convince us that if the law allowed the attorney to deal with the principal as he might with a stranger, these responsible trusts upon which the interests of society so much depend would be turned into means of the grossest fraud and oppression. The law has, therefore, prescribed strict rules of restraint upon the action of the attorney, and will never permit him to take advantage of his position to speculate upon the interests which are intrusted to him. Even in the case of a purchase of the subject of the suit by the attorney, the client may set it aside at his pleasure, unless the attorney show by clear and conclusive proof that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable. But no case has come to our knowledge where an attorney has been permitted after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, to go over and render assistance to the adverse side, and enforce, in a court of equity, the contract based on such acts, or the agreement to do them." 15 Cal. 401, 402.

In *People v. Spencer*, 61 Cal. 128, the proceeding was to suspend or disbar the respondent for acting on both sides in the case of one Harris. Spencer had drawn an indictment while district attorney against Harris, and afterwards appeared in the superior court of Lassen county as counsel for Harris, and moved to set aside the indictment. The court held that he must be suspended under the statute. Section 162, Pen. Code. It said, further:

"But, independent of statute, there can be no doubt that his conduct was reprehensible. By appearing both for plaintiff and defendant, in the same action, he was guilty of 'a violation of his duty as an attorney,' for which it is our duty to remove or suspend him. Code Civil Proc. § 287."

Monnell, in his work on Practice, cites Ferguson's *Irish Practice*, (a book to which we have not had access,) and makes an extract from it (see 1 Monnell, Pr. 182, 183) as to an attorney changing sides in the same cause. Ferguson says, (1 Ferg. Ir. Pr. 37, 38:)

"Lest any temptation should exist to violate professional confidence, or to make any improper use of the information which an attorney has acquired confidentially, as well as upon principles of public policy, he will not be permitted to be concerned on one side of the proceedings, in which he was originally in a different interest, even though his former client makes no objection; and though discharged many years ago, and feeling himself free to swear that he has forgotten the nature and purport of the communications he had received from the former client, and that they were not confidential; for the court cannot investigate the *plus* or the *minus* of the confidence reposed in him without an absolute disclosure of the facts, nor can it calculate how much of these confidential communications are still in the recollection of the attorney; but the mere circumstance of a retainer sufficiently implies the fact of confidential disclosure, to whatever extent, having been made."

Monnell cites as to this extract from Ferguson, *Lessee of Flynn v. Casual Ejector*, 1 Ir. Law, (O. S.) 59; *Hutchins v. Hutchins*, 1 Hogan, 315; *Keon v. Nesbitt*, 1 Sausse & S. 365, note; *Waller v. Fowler*, Id. 369.

It should be remarked in regard to the cases cited from the English reports that they all relate to attorneys or solicitors, not to counselors or barristers. In this state a person is admitted to the bar as both attorney and counselor, as the respondent here was, and this case is to be looked at in both aspects. It should be remembered that in England an attorney can only recover his bill of costs and necessary disbursements. A barrister has no action to recover compensation for his services. The attorney cannot recover damages for a breach of contract. With us it is otherwise. Both the attorney and counselor can, with us, maintain action for a breach of his contract of employment, and recover compensation therefor in damages. So when an attorney or counselor is unjustly discharged from a case, he can, in this state, recover compensation for any damage he may sustain by reason of such discharge. Owing to this difference of right, the law may be ruled in England in accordance with the contention of respondent.

Further, the respondent cannot be regarded as an attorney and counselor discharged by his client, the city and county of San Francisco. He was elected for a particular period of time or term, and when his term of office expired he was in no sense discharged. He took the term voluntarily, and by operation of law his employment ceased when his term ended. There is no analogy between the respondent's case and that of a private person discharging his attorney or counsel from a cause while it was pending. On this point the remarks of the supreme court of Georgia in *Gaulden v. State*, 11 Ga. 50, above cited, are applicable, and we concur with what is there said on this point. But though his employment ceased, his obligation of fidelity still continued, and nothing appears to have occurred which discharged him from this obligation. Indeed, we much doubt whether the city and county had power to discharge him. Is there any law authorizing it? This question, however, does not arise here, and we do not intend to decide it.

The respondent accepted a fee in the two cases above referred to *to sit out or stand out*, and did nothing at all in such cases. He bargained for and received a fee of \$100 for so doing. He had previously received of the city a fee in such cases in the shape of his salary, which was paid him. Conceding that an attorney and counselor at law may be retained not to act or advise professionally adversely to the person so retaining him, can this be the case where he had been previously employed or retained and paid in the same cause by the adverse party? We think not. The case cited (*McQuesney v. Hiester*, 33 Pa. St. 444) does not go so far. No case has been cited, nor have we been able to find one, where a counselor at law who has been employed and received a fee from one party, has been afterwards allowed to change sides, and accept a retainer from his adversary in the same cause. See *Sharsw. Leg. Ethics*, (5th Ed.) 117, 118.

Some remarks were made by Lord ELDON in *Cholmondeley v. Clinton* which are pertinent just here. "I recollect," he said, "many instances, both as to counsel and attorneys, in which it was extremely difficult for a man to say he should have been employed in both causes; and with regard to that, '*quod dubitas ne feceris*' is a good rule for the regulation of your own conduct; but I do not recollect an instance of a solicitor changing his situation from the defendant to the plaintiff. The case might easily be put that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it." 19 Ves. 266, 267.

Further, he said:

"The naked question is whether a person, having been for a considerable time employed in a cause for the plaintiff, can, after discharging himself, as I must take Mr. Montrion to have done, from the relation of attorney for the plaintiff in that cause, become attorney for the defendant. The answer to the novelty of the application is that the question must be considered open, unless in memory or tradition any instance can be shown of such a fact having actually occurred. I do not recollect, either in my own experience, or from information in the memory of any one, any such instance. The practice of the bar in my time was this: If a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option. That has, I believe, been relaxed, and the course now is as it has been represented at the bar. I do not admit that he is bound to accept the new brief. My opinion is that he ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him." Id. 274, 275.

These opinions of Lord ELDON go very far, and lay down a very strict rule as to the duties and obligations of attorneys and counsel. It is not based merely on *sentiment*, but on the rules of duty governing the relation as fixed by law. It will be observed that the lord chancellor is speaking of counsel as well as attorneys. The lord chancellor refers in the above remarks to the course as represented at the bar. In the argument against the motion it was said:

"If a counsel, having advised upon pleadings and evidence, not being retained, the next day receives a retainer on the other side, which he is not only entitled, but as a servant of the public bound, to receive, there is no practice requiring notice to be given of that. This applies equally to the other branch of the profession." 19 Ves. 268.

In reply to this Sir SAMUEL ROMILLY, for the motion, said:

"I do not understand the rule as to counsel to be as it is represented. I concur that a counsel consulted confidentially cannot counsel on the opposite side without giving notice. Great laxity, I admit, prevails as to retainers; a difficulty, when it occurs, is usually referred to some other counsel, and the consequence is that there is no general rule." 19 Ves. 269.

The counsel further stated: "It is admitted a counsel cannot reject a retainer and accept one from the opponent." 19 Ves. 271.

And in this view, as to a solicitor, Lord ELDON concurred. In Coop. 89, he said:

"I consider the question to be, *nakedly*, whether a person having been long officiating in a cause as the solicitor, and afterwards discharging himself, as I must take it that Montriou did in this case by the dissolution of partnership, can afterwards become the attorney on the other side in the cause." Coop. 87.

This question he decided, and held against Montriou. See his observations on page 89.

As we understand the case, the ruling was not on the ground that Montriou personally knew the facts communicated by Lord CLINTON, but his partner knew them, and under such circumstances Montriou was restrained from using it as solicitor for Earl Cholmondeley.

In this case the respondent agreed to sit out or stand out, and not argue the causes in the supreme court. He was thus to refrain from exercising the functions of counselor or barrister. He was to do this in cases where he had been employed and paid to act for a former client. He was not discharged by such former client. By the agreement he entered into he could not be employed by his former client. It was a violation of his duty of fidelity to his client as attorney and counsel to be employed and paid under such circumstances. We are of opinion that the rule laid down in *Spencer's Case* is correct, and should be enforced. It is the better rule, and one calculated to insure purity in the administration of justice, and command the confidence of the public in its administration. See 1 Monell, Pr. 182, 183.

It should be remembered that the respondent filled a public office, and the highest obligation of fidelity to the public rested on him. A proper public policy dictates that one employed by the choice of the people for a stated period, in the capacity of attorney and counsel for the state, or any portion of it, should not be allowed to say that he had received no confidential communications in his official capacity, and therefore that he was at liberty to be retained by the adversary in the same cause after his term of office had expired. It would be placing before gentlemen of the bar a temptation to neglect their duties when called to such public employment which no principle of law justifies. A just public policy forbids it. A trustee for sale is not allowed to be a purchaser at his own sale, and *e converso*, on like grounds. See *Michoud v. Girod*, 4 How. 554, 555. A great jurist, Lord LYNCHURST, has said that the rule as to a trustee dealing with his *cestui que trust* had its origin in considerations of public policy; also as to transactions between attorneys and their clients. See *Egerton v. Brownlow*, 4 H. L. 160, 161. These considerations of public policy apply here. See remarks of court in the case above cited from 11 Ga.

Let it be observed that the respondent knew that the cases above named were pending and undecided. Whittemore had spoken to him  
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in regard to them before the expiry of his official term. It is immaterial that he did not know all the evidence in the causes. He might have ascertained all the facts by inquiry. That he failed to inquire as to the facts can make no difference. The record was open to him. His abstention from knowledge of the facts, then, is immaterial. In a case where a counselor at law has argued a cause for his client in an appellate court, and where he has obtained his knowledge of the facts from the record alone, would it be permitted that in case of reversal of the judgment that he should change sides and conduct the cause in the court below for the adversary of his former client? Or where the same cause comes again to the court of appeal, that he could appear for the party opposed to that one for whom he had formerly appeared and spoken? Certainly he could not be permitted so to act. What confidence would be reposed in the administration of the law if such conduct would be allowed? With what safety could a client act in retaining an attorney and counsel? Mr. Weeks, in his book on Attorneys at Law, says an attorney may be stricken from the rolls for acting in an action or suit on both sides. Weeks, Attys. at Law, § 81, p. 152, citing *Mason's Case*, 1 Freem. 74, and *Berry v. Jenkins*, 3 Bing. 423.

The measure of punishment is a difficult question. But it should be remembered that at the time Mr. Cowdery accepted this employment, *Spencer's Case* had been decided, on September 21, 1882, by this court; and it should also be remembered that at the time Cowdery was employed by Whittemore he said to the latter, as quoted above: "I can do nothing against the city in this case, and I do not want, for appearance sake, to be consulted in them;" thus showing that the respondent had doubts as to the propriety of his conduct.

On a consideration of the whole case, we are of opinion that the respondent should be suspended from acting as attorney and counselor at law in any matter for the period of six months from the entry of the order herein.

The following order will be entered: In this cause, after hearing the evidence and considering the same, together with the pleadings herein, it is ordered that the respondent, J. F. Cowdery, be suspended from acting as attorney and counselor at law in any court in this state for the period of six months from this date.

We concur: MCKINSTRY, J.; MCKEE, J.; ROSS, J.

Justice SHARPSTEIN, was not present at the hearing.

MYRICK, J., (*dissenting*.) Mr. Cowdery, after the expiration of his term of office, owed duties to the city and county as follows: To impart to his successor, on request, whatever information he possessed in regard to the cases, and not to impart to opposing counsel information detrimental to the interests of the city. He did not vio-

late his duty in either of these respects. There is no evidence that he declined to give to his successor in office any information, or that the city and county desired his services. He accepted a retainer not to appear in the cases as attorney for the city and county. He was not in duty bound to accept a retainer from the city and county. However, it was unwise for him to accept the retainer from the opposing counsel, for two reasons: (1) By so doing he subjected himself to a kind of criticism which no attorney should willingly subject himself to; (2) he received a fee with the understanding that he was to render no services therefor. If immediately upon his attention being called to the doubtful propriety of his acceptance of the money he had at once returned it, he would have saved himself and the bar association much unpleasant feeling. In regard to criminal prosecutions, the legislature has by law forbidden an attorney who has prosecuted an action from taking any part in the defense, and has declared that by such act he should forfeit his license to practice law. The wisdom of applying the same rule to civil cases may be for the consideration of the legislature, as may also be the question whether attorneys should accept retainers without expectation of being actively employed.

In view of the whole case, as no harm occurred to the city and county, and none was attempted, I think suspension or revocation of the license a severity not called for.

Mr. Whittemore's position is, in substance, as follows: After the expiration of Mr. Cowdery's term of office he asked the latter if he was free to accept a retainer not to appear in the cases against him, (Whittemore,) and was informed that he was, and thereupon the fee was paid. I think whatever responsibility there was in the transaction, and the decision as to its propriety, was with Mr. Cowdery. Mr. Whittemore did not ask Mr. Cowdery to violate any duty he owed to the city and county, nor to give any information detrimental to its side of the cases.

#### NOTE.

In the case of *In re Gates*, (Pa.) 2 Atl. Rep. 215, where an attorney at law was suspended from practice on petition of the bar association of the county in which he practiced, on proof of having abstracted from the files in the office of the prothonotary a receipt attached to a *feri facias*, the act of the attorney was held to be such unprofessional conduct as justified the action of the court.

For a full discussion of the question of disbarment of attorneys for unprofessional conduct, see *In re Houghton*, (Cal.) 8 Pac. Rep. 52, and note, 57-59.

(69 Cal. 67)

*In re* WHITTEMORE. (No. 11,254.)

Filed February 27, 1886.

## ATTORNEYS AT LAW—DISBARMENT FOR UNPROFESSIONAL CONDUCT.

Where the relation of an attorney with a certain party has been that of attorney and client in a suit, and during such relation he has acquired knowledge of a certain point which is favorable to his client and fatal to the case of the other party, and, his relation having ceased, another attorney offers him a fee as a retainer in the suit on the side opposed to that of his former client, for the rendition of no services other than that he shall not disclose said point, the latter, acting with a knowledge of all the facts, is guilty of unprofessional conduct, and a violation of his duty as an attorney and counselor at law, and may be suspended.

In bank. Proceedings for disbarment of an attorney and counselor at law.

*William Matthews, E. R. Taylor, and H. J. Tilden*, for the prosecution.

THORNTON, J. In this case the facts are the same as in *In re Cowdery*, ante, 47, except that Whittemore was the employer, and in the other case just mentioned Cowdery was the employee.

Whittemore, an attorney and counselor of this court, employed Cowdery with a knowledge of the relations which Cowdery bore to the cases of *Bonnet* and *Parker v. City and County of San Francisco*. He was, when he retained Cowdery, fully aware of the public capacity in which Cowdery had charge of the causes above named, and that Cowdery when he accepted a retainer from him was changing sides in the litigation. In employing Cowdery he violated his duties as an attorney and counselor at law. Ordinarily, when an attorney calls on another attorney and asks him if there is anything in the way of his being employed in a cause, and he replies that there is nothing in the way of his accepting such employment, we should hold that there would be no impropriety in his employing him. But it is different here. Whittemore knew Cowdery's relation to the causes as above stated, and we are of opinion that it was a violation of his duties to the court in so doing.

In this cause the following order will be entered: This cause having been heard on the pleadings and proofs, and considered by the court, and the court having come to the conclusion that Whittemore has violated his duty as an attorney and counselor of this court in employing J. F. Cowdery as attorney and counsel, it is hereby ordered that said D. H. Whittemore be, and is hereby, suspended for the period of six months from this date from appearing or acting as attorney or counselor at law in all the courts of this state.

We concur: ROSS, J.; MCKEE, J.; MCKINSTRY, J.

Mr. Justice SHARPSTEIN was not present at the hearing.

(69 Cal. 1)

*In re* BUCKLEY. (No. 20,131.)

Filed February 27, 1886

1. **CONTEMPT—CLAIMING TO HAVE IMPROPER INFLUENCE WITH COURT.**

Claiming to have influence with a court, and to be able through such influence to be able to obtain a decision favorable to a particular party, is a contempt of court.

2. **SAME—CRIMINAL PROCEEDING—ESTABLISHMENT OF GUILT.**

Contempt is a criminal, or *quasi* criminal, proceeding, and therefore the evidence of guilt of the respondent must be established beyond a reasonable doubt, by clear and satisfactory evidence, and the mere preponderance of proof is not sufficient to establish the guilt of the accused.

3. **SAME—TRIAL OF PARTY CHARGED.**

In case of a contempt not committed in the presence of the court, a trial must be had on pleadings and evidence.

4. **SAME—ACCOMPLICE, CONVICTION ON EVIDENCE OF.**

A conviction cannot be had in a criminal case on the testimony of an accomplice alone, under section 1111 of the California Penal Code, and this rule is applicable to contempt cases.

ROSS, MCKINSTRY, and MCKEE, JJ., dissent.

In bank. Proceeding against respondent for alleged contempt of court.

*The Attorney General*, for the prosecution.

*Preston & McPike* and *D. H. Regensburger*, for the defense.

THORNTON, J. This is a proceeding taken against the respondent, Buckley, for an alleged contempt of this court. The contempt charged relates to the cases of *Bonnet v. City and County of San Francisco*, 3 Pac. Rep. 815, and *Parker v. Same Defendant*, 3 Pac. Rep. 816, which were pending in this court on appeal before, on, and after the tenth day of May, 1884. In each of these causes judgment of affirmance was rendered by this court on the day last named. These judgments of affirmance were in favor of Bonnet and Parker. The contempt charged is that on the said day the defendant, well knowing that these causes had been decided by this court in favor of the parties above mentioned, affirming judgments in their favor given in the court below, for and in consideration of the sum of \$500, which Bonnet agreed to pay him, agreed and undertook with Bonnet that he (Buckley) would procure to be given and made by this court a judgment in favor of Bonnet and Parker, respectively, in the cases above stated; that Bonnet was at the same time assured by Buckley, and was made to believe, that he (Buckley) possessed such influence with this court, and the members thereof, that he could procure through his influence said judgments in said actions to be given and made respectively in favor of said Bonnet and Parker.

Buckley, in obedience to an order to show cause, appeared herein, and in a verified answer denied the charge in every particular.

That the conduct with which respondent is here charged is a con-

tempt of this court we have no doubt. This is a proposition of law to us so plain that we think it unnecessary to discuss it further.

The material question to be considered relates to the guilt of respondent. The guilt of respondent must be established as a fact by clear and satisfactory evidence. If not so established, this court has no right to punish him. It should be remembered that the proceeding here taken is criminal or *quasi* criminal. It was so held by this court in *Ex parte Crittenden*, 62 Cal. 534, following *New Orleans v. Steam-ship Co.*, 20 Wall. 392, where it is said: "Contempt of court is a specific criminal offense." See, also, *Hummel's Case*, 9 Watts, 421; *Cartwright's Case*, 114 Mass. 230; *Durant v. Supervisors*, 1 Woolw. 377; Com. Dig. "Attachment," 4; 4 Bl. Comm. 288.

The punishment for a contempt may be fine or imprisonment, or both,—a punishment appropriate to criminal offenses. See Code Civ. Proc. §§ 1218, 1219. Under such circumstances the guilt of the party charged should be proved and established by clear and satisfactory evidence. A mere preponderance of evidence would not be sufficient to warrant the infliction of so serious a punishment. We know of no rule of law in this state authorizing any court to fine and imprison a person on a mere preponderance of evidence as to his guilt. The guilt must be established by clear and satisfactory proof, and generally, if not always, in criminal actions, beyond a reasonable doubt. It would be against all correct rules of law and principles of justice to permit guilt, under such circumstances, on a conviction of which punishment so serious and severe may follow, to be established by less than clear and satisfactory proofs.

In the matter of the application to disbar R. E. Houghton, an attorney of this court, (8 Pac. Rep. 52,) it was said:

"A judgment against the respondent will deprive him of personal and property rights. Unless we are clearly satisfied of respondent's guilt, we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied, we decline to strike his name from the roll."

These remarks apply to this case. Such, in our judgment, is the legal result deducible from our statute relating to contempts, (Code Civil Proc. §§ 1209, 1210, *et seq.*), by which an issue is required to be made up and tried as to the guilt of the accused, (Code Civil Proc. §§ 1217–1219.

It may be remarked that this was not so at common law. In such proceedings in courts of law not committed *in facie curiæ*, if a party charged with contempt cleared himself by his oath denying his guilt, he was by a court of law discharged. If, however, in making such oath he was perjured, he might be prosecuted for perjury. Such is the statement of Blackstone as to proceedings upon such contempt in courts of law, (see Bl. Comm. 287,) and this is confirmed by the authorities. But in this state the subject is regulated by statute, as stated above; and of contempts not in face of the court an issue is made up by answer, and witnesses are called and examined as in

other causes. In other words, a trial is had as in other cases. In this case, the contempt charged not having been committed in the face of the court, a trial was had on the pleadings and evidence.

The evidence in regard to the transaction in which the contempt is said to have been committed is found in the testimony of B. Bonnet, J. W. Taylor, and the respondent. Bonnet was the plaintiff in the above-named case of *Bonnet v. City and County of San Francisco*. Bonnet testified that:

"On the tenth of May, 1884, he and Joseph W. Taylor met Buckley at his saloon, in the city of San Francisco, about 8 o'clock in the evening. Buckley invited them inside his private place, and then the respondent said to him: 'You got a case in the supreme court?' I told him 'yes.' Taylor told him, before they got to Buckley's saloon: 'Buckley could get a judgment for you right away;' and when we got there, Buckley, in his private room, said: 'I can get judgment for or against you in this case;' and Taylor said: 'I suppose the judges will be down here to-night or to-morrow;' to which Buckley said: 'Oh, yes; there is two already here.' Taylor asked him, [Bonnet:] 'Well, suppose we make a note for \$500.' He asked him if \$500 was satisfactory to him, or something of that kind, and said: 'Suppose we make a note for \$500, and give it to him.' I says: 'I won't pay no \$500. I won't pay it. My brother won't authorize me to do so.' 'Well,' he [Taylor] says: 'I will pay half of it.' 'Well,' I says, 'all right; if you pay half of it we will pay it;' and then Taylor drew a note himself, and gave it to me to sign. I signed the note. I told him, says I: 'Ain't you going to sign?' He says: 'No; I don't want my name to appear, but it is understood I pay half of it;' and I said: 'Mr. Buckley, is that correct? You won't make my brother responsible for more than \$250?' 'Yes,' he says, 'and Taylor will pay over the other half.' 'Well,' he [Buckley] says: 'I can have this judgment rendered immediately, and dated to-day, to-morrow, or Monday, or any time you want it.' I says: 'It is not particular about the date. I don't care about that.' So we met and parted that way, I think. Taylor gave the note to Buckley in his presence, and it was left with him."

The witness, at request of the prosecuting counsel, explained the reference to his brother. The money, he said, belonged to his brother, Eli Bonnet. It appeared that the claims belonged to Eli Bonnet, who had assigned them over to him, which he had assigned to Taylor. The claims in both the *Cases of Bonnet and Parker* had been assigned to Taylor some time before as security for money advanced, and the witness was acting for his brother, who was sick. When a settlement was had with Taylor he was present, and \$250 was retained out of the money in payment for that note. When this settlement was had, Taylor, D. H. Whittemore, M. J. Kelly, Eli Bonnet, and himself were present. Buckley was not there,—in fact had gone east. The money was not paid to Kelly, who had the note, but Taylor kept it, and said that he would see that the note was paid. At the time the note for \$500 was given to Buckley, B. Bonnet stated that he did not know that judgment had been rendered in the supreme court; that he did not know of it until the following Monday, the twelfth of May, when he saw it in a newspaper. He then told Taylor not to pay the note; that it was obtained on "*false pretensions*." This is, in sub-

stance, the testimony of Bonnet which has any bearing on the matter of the contract.

Buckley was called, and testified as to the interview with Taylor and Bonnet on the evening of the tenth of May. He said:

"My recollection of the affair is that Mr. Taylor called upon me at my place of business that evening, in May, with a gentleman he said was Mr. Bonnet, and asked me if he could see me privately for a few moments. I went with him into a room in my saloon. Mr. Taylor introduced me to Mr. Bonnet, and said he was very anxious to see me in relation to the matter of these claims that was coming up before the board of supervisors,—was very anxious that I should interest myself for him in trying to have these matters brought before the board. Some conversation in relation to the matter took place. *Question.* State what it was as near as you can recollect it. *Answer.* As near as my recollection serves me it was this: Mr. Taylor told me that in matters of this kind, that before obtaining their money they had to go before the board of supervisors; and recited some cases, and, among others, the name of Phelan, that was adjudicated by the court, and went to the board of supervisors, and there remained some four or five years, going from one board to the other; and the object of my assistance was to have this matter brought up and acted upon by the board of supervisors, and he asked me if I would not interest myself. I told him I did not know what I could do. I had known Mr. Taylor for a long time, and was willing to do anything I could for him. So Mr. Taylor and this other gentleman had a conversation between themselves, and they afterwards returned to me, and said: 'We do not want your services for nothing. We are willing to agree to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure your payment of it will give you a note,' which they did, and I agreed to assist them, and do what I could in the matter. That is about the conversation, as I recollect it."

Buckley further testified that the name of the supreme court was never mentioned during the conversation; that nothing was said of the members of the supreme court, and their names were never mentioned; nothing was said of his influence with the supreme court, or of his ability to procure decisions; that he never at any time or place had a conversation with Bonnet, or any one else, in relation to the supreme court, or any member of it, or regarding his influence with the supreme court; that he had never stated to any person that he had any influence with the supreme court, or that he could procure decisions; that he had stated to the best of his recollection the whole of the conversation that took place at the time referred to; that Bonnet's statement of the conversation was false from beginning to end, and that no such conversation as that detailed by Bonnet ever took place with him, or in his presence.

It appeared in evidence that a dispatch had been sent from Sacramento on the morning of the tenth of May, 1884, signed by J. W. McCarthy, then clerk of the supreme court, addressed to Buckley, Bush street, San Francisco, in these words: "*Parker and Bonnet v. San Francisco*,—judgment affirmed;" that this dispatch was received in San Francisco at 10:43 A. M., and delivered at Buckley's place of business to one Thomas F. Doran, who was an employe of Buckley,

at 323 Bush street, at 10:48 A. M. Buckley testified that he never received this dispatch, and had no recollection of ever hearing it read until it was read in his presence this morning. His secretary testified to the like effect. Doran was not called. Taylor is called, and gives his version of what took place at Buckley's saloon on the evening of the tenth of May; and testified:

"I know no more or less than that Mr. Bonnet wanted me to go and see Mr. Buckley. He wanted me to take him up there. He did not know him, and wanted to see him,—to help us through the board,—and I took him up there. \* \* \* I told him I would, and went up there, and met Mr. Buckley, and told him Mr. Bonnet wanted to see him about helping him get some judgments through the board of supervisors. He said that he did not know if he could do much of anything to get the bills through."

The witness referred in this to the payment of the judgments. The witness further stated:

"I told him, I said: 'Mr. Bonnet thinks you can help us, and he would like to have you help us if you can.' He said: 'Taylor, I do not know that I can;' and I said: 'Mr. Bonnet does not want you to do this for nothing, and if you will help us he will give you something; and he said: 'I do not know that I can do anything; and Bonnet said: 'He can, if he likes, help us.' He says: 'If he wants, he can do it.' Bonnet says to me: 'Look here, you had better give something;' and I said: 'What do you want to give him? I am satisfied to let things go as they are,'—I was drawing sixty dollars a month interest; and he said: 'Well, we had better offer him \$500;' and I said: 'All right; if you want to help us through the board, Mr. Bonnet is willing to give you a note for \$500, and whenever the money is paid from the treasury the bill is paid;' and he said: 'I do not know. I will try and do what I can, but I do not know whether I can help you any, Taylor.' Then I drew up the note, and put the name of Bonnet in. I made a common note on a printed form. I drew the note up there. I did not know, and had not heard at that time, that the cases of Bonnet and Parker against the city had been decided. Nothing was said in the conversation of the supreme court or the judges of the court; nor did Buckley speak of his influence with that court. The name of a supreme court judge was never mentioned in the conversation. Never at any time had any conversation with Buckley touching his influence with the supreme court. He never agreed to pay half of the note for \$250."

There was testimony showing that Taylor admitted before the committee of the bar association that when the conversation took place on the evening of the tenth of May, 1884, he knew that the supreme court had decided the *Bonnet and Parker Cases*.

It will thus be seen that Buckley and Taylor contradict Bonnet's testimony as to the conversation of the tenth of May. Buckley and Taylor both state that the supreme court was not mentioned, nor was the name of any of its members mentioned or referred to, nor anything said by Buckley in regard to it.

It is urged that the guilt of the respondent is established by circumstances which appear in evidence. It appears from the testimony that Buckley took some steps to procure the advancement of the *Cases of Bonnet and Parker* by this court. The testimony in relation to this matter is substantially as follows: Not long before the order advancing the cases was made by this court, Buckley states

that Taylor called on him at his place of business, and said that he had an assignment of cases or judgments, and wanted him to procure some information for him from the city and county attorney's office in relation to the trial of this case, (*Bonnet v. City*;) and also to see if he would go among his friends here, attorneys, and see if we could get a place on the calendar,—get them a substitute for the case that they might have on that calendar. For this service he received \$500 from Taylor at the time; that at the time he received the money he did not know that it was the money of B. Bonnet. He ascertained afterwards that the cases were advanced without his aid; and that he has never offered to return the \$500 received by him. He went around among the attorneys and found a place for the cases on the calendar, which they did not use. The case for which they were substituted was an entirely different one. He never represented to Taylor that he had any influence with the supreme court by which he would have the causes advanced. Taylor informed him that the city attorney would not try the cases if they were advanced, and he wished to find out if he would try the cases if they were advanced. He never intimated to Taylor or any one else that he had even an acquaintance with the supreme court, or had any influence over it, in any way, shape, or form. Buckley stated further that he went to the office of the city and county attorney, saw Mr. Craig, who was then such attorney, and told him that he was not an attorney. Told him of the cases, and asked him if there was any objection, and he said, "No." Said he would try the cases, and he gave his information to Mr. Taylor. In this transaction the supreme court was not talked about or discussed, nor were its members. It should be stated here that the cases referred to were advanced on motion of counsel, in accordance with the usual practice of this court,—a practice which had obtained for several years.

Another circumstance is the receiving of the dispatch, which has been mentioned above. It is only necessary to say further in regard to it that this dispatch was sent to Buckley by a deputy in the clerk's office, in accordance with a custom which had for some time existed in that office. It was sent by Deputy Williams in consequence of a request put on a notice board kept in the clerk's office. This request was put on that board by Myers, another deputy in the clerk's office, who was a friend of Buckley's, on a supposition that Buckley had some interest, or felt some interest, in the cases. The dispatch was not sent until the opinions of the court in the cases referred to had been filed in the office of the clerk.

With regard to the first circumstance relating to the advancing of the causes, we cannot perceive how this tends in any way to prove that Buckley is guilty of the contempt charged. It has no relevancy in that regard. Take the evidence of Buckley's connection with the advance of the cases: It appears that that transaction had been entirely concluded before the contempt is charged to have been com-

mitted, and we must say that what the evidence shows Buckley did in regard to such advancement was nothing more than any citizen might have done without impropriety. He did not pretend to act in the matter as an attorney. He went to the office of the city and county attorney and procured some information, and found a case in place of which the cases could be substituted. Really, as it turned out, the cases were advanced on motion of an attorney of this court who appeared in the cases, in place of a case other than that which was found by Buckley. The above is all Buckley did, and in that we see nothing wrong. In this remark we express no opinion as to his receiving \$500 for his services in regard to advancing the cases. If the parties chose to pay him that sum for his services they had a right to do so. In regard to the whole matter of advancing the causes there is no evidence that Buckley ever pretended or gave out that he had any influence with this court, or that he was using such pretended influence in any way.

With regard to the other circumstance, it is said that Buckley testified falsely when he stated that he never received the dispatch sent from Sacramento on the tenth of May. Concede that this is so—that he did swear falsely in this regard—his receipt and knowledge of it would tend to show that his statement in regard to his employment to use his influence with the board of supervisors was true.

It may be asked that if he did not receive this dispatch, and neither he nor Taylor nor Bonnett knew that the cases were decided, why should they make any agreement with regard to the board of supervisors? Why make any such agreement in advance of the decision by this court of the *Bonnet* and *Parker Causes*? It does appear improbable that any such agreement should be made in advance of the action of this court, but on an improbability of this character this court cannot base a judgment of guilt; nor would it be justified in rendering any such judgment on such improbability, taken in connection with all the other testimony in the case. In our view, the probability is that he received the dispatch and knew of the judgment of this court at the time of the interview of the tenth of May, and, in this view, the improbability urged vanishes.

From a review of the whole evidence we are of opinion that the guilt of the respondent is not made out. The evidence in favor of innocence, in our judgment, predominates. Bonnet's testimony alone tends to prove guilt, and that is contradicted by respondent and Taylor. We are further of opinion that Bonnet is impeached by the testimony of F. A. Hornblower, J. H. Knight, and John Lewis, who testify that they know Bonnet's general reputation for truth and honesty and integrity, and that it is bad.

It should be also observed here that Bonnet is an accomplice with Buckley and Taylor on his own admission. In relation to the testimony of an accomplice, it is provided by the Penal Code, § 1111, that "a conviction cannot be had on the testimony of an accomplice unless

he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." There is no evidence which in itself, without the aid of the testimony of Bonnet, tends to connect Buckley with the commission of the offense charged. In fact Bonnet's testimony is the only evidence of the commission of the offense. The foregoing rule as to accomplices should have its due weight in passing on this cause.

We are of opinion that the guilt of Buckley is not shown, and that the order to show cause should be discharged and the proceedings dismissed. So ordered.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

MYRICK, J., (*concurring*.) 1. As to the law: I have no doubt of the proposition that if a person pretend or give out that he can, by improper means, influence the decisions of this court he is guilty of a contempt, and may be punished. The power to adjudge and punish for a contempt in such case is inherent in the court, and has not been circumscribed by the constitution. It is not necessary to look to the statute to see if such an act has been declared to be a contempt or the punishment therefor has been defined. The judicial department, in this regard, adjudges for itself, being responsible, as in other cases, for the abuse of the power. To illustrate as to the inherent power of the court: Suppose the statutes were silent as to what acts constitute a contempt, and as to the punishment; suppose a person should, in open court, by violent conduct, disturb and interrupt the proceedings: could it be maintained that the court was powerless except to turn the person over to the police? I think not. This inherent power should, however, like all power, be prudently but firmly exercised when necessary. It has been well said by a great writer that "a judge who listens to private solicitations is a disgrace to his post." "If it should prevail, it perverts justice; but if the judge be so just and of such courage, as he ought to be, as not to be inclined thereby, yet it always leaves a taint of suspicion behind it." A person who gives out that he can, by private solicitations or personal influence, procure decisions by a judge, does all he can to bring the office into contempt. The vulgar fellow who misbehaves in open court and interrupts its proceedings commits an offense trifling in character as compared with him who holds himself out as capable of bringing the very office itself into disgrace and of making the administration of justice a mockery. The very existence of a court, as a court, needs not only the quiet order of decorum, but it needs the confidence of the community in the impartiality of its decisions.

2. As to the facts: The decisions in the *Bonnet* and *Parker Cases* in this court were filed in the clerk's office at Sacramento about 10

o'clock A. M. of May 10, 1884. On the trial in this proceeding Bonnet testified that during the afternoon of that day Taylor sought him, and said Buckley wished to see him; that in the evening they went to Buckley's place of business, and there Bonnet executed to Buckley his promissory note for \$500, the consideration for which was Buckley's professed influence with this court to obtain decisions in the cases in Bonnet's favor, and on such day as he pleased. The chief circumstance in corroboration of Bonnet's testimony is that a deputy clerk of this court, immediately upon the decisions being filed, sent to Buckley a telegram stating the fact; and this telegram was, in due course, received by Buckley's bar-keeper at 10:48 A. M. On the other hand, Buckley and Taylor testified that at no time was this court, or any member thereof, mentioned; that they expected favorable decisions by reason of a former decision involving the same principle; that the note was given for services to be rendered in urging action on the part of the board of supervisors looking to speedy payment in case of favorable decisions in this court. Taylor and another witness testified that it was Bonnet who sought Taylor for the purpose of being introduced to Buckley, instead of Taylor seeking Bonnet. The deputy clerk swore that the telegram was sent without any request from Buckley, and because he supposed Buckley had some interest in the cases, as he had heard him, some time before, making inquiries about them; and Buckley and his secretary swore that the telegram did not reach them. Buckley, not having the use of visual organs, could know of the telegram only by its being stated or read to him, which, they say, was not done.

It will thus be seen that the testimony as to the substantial point, viz., whether Buckley assumed or gave out that he could influence the action of this court, is in direct conflict, Bonnet swearing upon one side, Buckley and Taylor on the other. It is possible that the explanation given by the deputy-clerk as to the sending of the telegram is correct. If so, it fitted in so closely between the filing of the decisions and the making of the note as to give rise to stringent criticism.

I heard all the testimony in open court, and since the hearing I have twice read it carefully through, and the result is that I have grave doubt as to which side is correct. Bonnet admitted to have said that Buckley had done no wrong, and that there never would have been any trouble about the matter except for a subsequent disagreement between himself and Taylor regarding \$650 of the money received on the judgments. How far was Bonnet's testimony influenced by his annoyance in being, as he supposed, overreached in the settlement? How far was Buckley's and Taylor's testimony influenced by a desire to be relieved from a grave charge? I am unable to arrive at a satisfactory conclusion. I cannot say that I have an abiding conviction, beyond reasonable doubt. I am therefore of opinion that the charges are not proven.

Ross, J. I dissent. The gist of the charge against the respondent, Buckley, is that in the evening of the tenth day of May, 1884, he undertook, for a money consideration, to be paid to him by one Bonnet, to procure the judgment of this court favorable to the plaintiffs in two certain actions entitled, respectively, *Bonnet v. City and County of San Francisco* and *Parker v. City and County of San Francisco*, at the time representing that he possessed such influence with the justices of the court as would enable him to procure such judgments as he desired. As a matter of fact, the cases referred to were decided at the city of Sacramento, shortly after 10 o'clock A. M. of the tenth day of May, 1884; but of that fact Bonnet was ignorant, and the respondent, Buckley, claims to have been ignorant until some time after the expiration of the day mentioned. In his answer respondent explicitly denies that he ever, at any time or under any circumstances, undertook to procure any decision in the cases referred to, or in any other case or cases, or that he ever represented that he had, or pretended to have, any influence with this court, or with any justice thereof; but that the consideration, and the sole consideration, for the money Bonnet agreed to pay him was certain services that he (respondent) agreed to render Bonnet in expediting the disposition of his claims by the board of supervisors of the city and county of San Francisco.

While strenuously contesting the truth of the charge against him, respondent claims that, even if it should be found to be true, it does not constitute a contempt of court, for which offense the present proceeding is prosecuted. It is contended that the legislature has defined contempts, and the punishment thereof, and that the charge in question does not come within the statute, the provisions of which, it is claimed, are exclusive. I am inclined to think that the charge in question is embraced by the ninth subdivision of section 1209 of the Code of Civil Procedure; but, assuming that it is not, I am of the opinion that this court has the inherent power to punish for contempts. It is true that the power to punish for contempts may be limited and defined by the authority creating the court, (*Ex parte Robinson*, 19 Wall. 510;) but can the power of a court created by the constitution to punish for contempts be limited and controlled by an act of the legislature? I think not. While every court should be very careful not to assume to itself powers it does not possess, it is no less its bounden duty to exercise its powers in all proper cases. The supreme court of this state was created by the constitution and exists by virtue of its provisions. It not only has the right of existence by virtue of the constitution, but it is thereby charged with the performance of important functions. Its jurisdiction cannot be diminished by legislative enactment. Every power necessary to the due and proper performance of the duties with which it is charged is impliedly conferred by the organic act creating it. "Certain implied powers," said the supreme court of the United States in *U. S. v. Hudson*, 7 Cranch. 34, "must necessarily result to our courts of justice,

from the nature of their institutions. \* \* \* To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute."

In the case of *State v. Morrill*, 16 Ark. 384, where it was contended, as it is here, that the court was controlled by the statute, and could not go beyond its provisions, the supreme court, in holding against the proposition, asked these pertinent questions:

"Had the legislature never passed the act above quoted, or any act at all, on the subject, could it be doubted that this court could possess the constitutional power to preserve order and decorum, enforce obedience to its process, and maintain respect for its judgments, orders, and decrees, and, as a necessary consequence, punish for contempts against its authority and dignity, without which it could never accomplish the useful purposes for which it was established by the framers of the constitution? If the general assembly were to repeal the act, would any lawyer seriously contend that the courts were thereby deprived of the power to punish contempts? One of the counsel of the defendant frankly admitted that they would not, and the admission concedes the position to be true that the power of this court to punish contempts is inherent, springing into life along with, and as an incident to, those great judicial powers carved out for its exercise by the constitution."

My conclusion on this branch of the case is that as this court has the constitutional right of existence it has the constitutional right of self-protection, which cannot be taken away or abridged by legislative enactment.

The next inquiry to be made is whether the act charged against the respondent, if true, constitutes a contempt of court. This question cannot admit of any sort of doubt. No stream can be pure whose source is tainted. There can, therefore, be no greater or fouler blow at the administration of justice than for one to falsely and fraudulently pretend and undertake, for a money consideration, and by means of a pretended influence with the judge, to procure a particular decision. Such a practice, if allowed to prevail, would destroy all confidence in courts and sap the very foundation upon which society rests. It would, therefore, be a most fatal and dangerous interference with the administration of justice, and in every instance where it is shown should be visited with severe and summary punishment, not, as said by an English judge, for the sake of the judges as private individuals, but because they are channels through which justice is conveyed to the people.

It remains to consider whether the evidence establishes the fact charged, that respondent did undertake, for a money consideration to be paid him by Bonnet, to procure the judgment of this court favorable to the plaintiffs in the suits mentioned, at the time representing that he possessed such influence with the justices of the court as would enable him to procure such judgments as he desired. In respect to this question the testimony is very conflicting, but there are

certain facts about which there can be no doubt. One is that the cases referred to were decided by this court, in Sacramento, in favor of the respective plaintiffs therein, shortly after 10 o'clock A. M. of the tenth day of May, 1884. Another is that within a few minutes after the opinions in the cases were filed with the clerk a telegram was sent by a deputy clerk, in the name of his principal, to the respondent, Buckley, advising him of the decisions, and delivered to an employe of respondent at his place of business on Bush street, in the city of San Francisco, before 11 o'clock A. M. of the same day. Another is that about 8 o'clock in the evening of the same day Buckley, Bonnet, and one Taylor met in the private room of Buckley, at his place of business, and there Bonnet promised to pay Buckley a certain sum of money for *some* purpose, and as an evidence of his promise executed to Buckley his promissory note for \$500. The consideration for the note is the subject-matter of the present inquiry, and in respect to that the testimony of Bonnet on the one side, and of Buckley and Taylor on the other, is in direct conflict. According to his own testimony, Bonnet was a party to the offense, and therefore, apart from the further facts that the testimony tends to show that his character for truth, honesty, and integrity is bad, and that a part of his testimony in the case is contradicted by that of other and third parties, we ought not to find against Buckley unless there are other facts and circumstances in the case that satisfy us of the truth of Bonnet's statement of the transaction. Buckley's version of it is here given in his own language:

"My recollection of the affair is that Mr. Taylor called upon me at my place of business that evening, in May, with a gentleman he said was Mr. Bonnet, and asked if he could see me privately for a few moments. I went with him into a room in my saloon. Mr. Taylor introduced me to Mr. Bonnet, and said that he was very anxious to see me in relation to the matter of these claims that were coming up before the board of supervisors,—was very anxious that I should interest myself for him in trying to have these matters brought before the board. Some conversation in relation to the matter took place."

Being asked to state what it was as near as he could recollect, the witness replied:

"As near as my recollection serves me it was this: Mr. Taylor told me that in matters of this kind that before obtaining their money they had to go before the board of supervisors; and recited some cases, and, among others, the name of Phelan, that was adjudicated by the court, and went to the board of supervisors, and there remained some four or five years, going over from one board to the other; and the object of my assistance was to have this matter brought up and acted upon by that board of supervisors, and he asked me if I would not interest myself. I told them I did not know what I could do. I had known Mr. Taylor for a long time, and was willing to do anything I could for him. So Mr. Taylor and this other gentleman had a conversation between themselves, and they afterwards returned to me and said: 'We do not want your services for nothing. We are willing to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure you payment of it will give you a note;' which they did, and I agreed

to assist them and do what I could in the matter. That is about the conversation, as I recollect it."

Now, in considering this testimony, it must be borne in mind that Taylor denied, on this hearing, that he knew, and Buckley testified that he had no recollection of knowing, at the time of making the agreement, that the cases had, in fact, been decided by the court, although it was shown that Taylor had previously stated before a committee of the bar association that he was, at the time, aware of the fact. There is no pretense that Bonnet knew of the decisions at the time of the arrangement in the room of Buckley's saloon in the evening of the tenth of May, or that Buckley or Taylor informed him of them. If none of these parties knew that the cases had been decided, the inquiry naturally arises: Why should they, at that time, be arranging for a prosecution of the claims before the board of supervisors? Until the plaintiff's judgments should be affirmed by the court there was nothing to be presented to the board. An affirmance of the judgments by this court was a condition precedent, without which there was nothing for the board to act on. From the stand-point of ignorance of the fact that the cases had been decided by the court there was therefore no occasion whatever for any arrangement for the prosecution of the claims before the board of supervisors. But for another reason I cannot accept as true the statement that Buckley and Taylor had no notice of the decisions in the *Cases of Bonnet and Parker* at the time of the arrangement with Bonnet, in the evening of the tenth day of May.

As has been said, it was shown on the hearing of this matter that Taylor admitted before the committee of the bar association that he had such knowledge, but he attempted to explain away that fact in his testimony here by saying that he did not understand the questions asked him on those proceedings. An examination of the reporter's notes, however, shows that he could not have misunderstood the questions in that behalf, for they were perfectly simple and direct, and were several times repeated and answered. Nor is ignorance on Buckley's part of the fact that the cases referred to had been decided by this court at the time of the arrangement in question consistent with Taylor's knowledge, or the still more pregnant fact that a telegram from the clerk's office of this court, advising him of the decisions, was delivered to one of his employees, at his place of business, prior to 11 o'clock A. M. of the tenth day of May. Apart from the presumption that a telegram so delivered reached him, all of the circumstances of the case point to the fact that it did. I must therefore find that both Taylor and Buckley knew of the decisions of this court in the *Cases of Bonnet and Parker* at the time of the interview between Taylor, Bonnet, and Buckley, about 8 o'clock in the evening of the tenth day of May. Knowledge of that fact on the part of Taylor and Buckley, and ignorance of it on the part of Bonnet, is consistent with the statement of Bonnet as to what the agreement between the parties really

was, while it is inconsistent with Buckley's and Taylor's statement of it. Then, again, the acceptance of Bonnet's promissory note by Buckley is consistent with Buckley's and Taylor's knowledge of the decisions; for Taylor held an assignment of Bonnet's interest in the actions to secure the payment of certain advances he had made him. In case of the affirmance of the judgments in the *Cases of Bonnet and Parker*, Bonnet would have money and the note would be good. But except his interest in these actions, the testimony shows Bonnet to have been wholly impecunious,—so much so, indeed, that about the time of the transaction in question he borrowed \$50 of Taylor, for which he gave him his (Bonnet's) note for *one hundred and fifty dollars*, and which was subsequently, and within a short time, paid out of the amounts collected upon the judgments in the actions of Bonnet and Parker; and for the sum of \$45, borrowed of one Long, he executed to the latter his promissory note for *three hundred dollars*, which was also paid out of the proceeds of the same judgments. Still another consideration points to the same conclusion, and it is this: Buckley testified that shortly after Bonnet gave him the \$500 note, he (Buckley) left California for the east, but before doing so he turned the note over to his friend, M. J. Kelley, who he said could do as much with the supervisors as himself. But it is not pretended that either Buckley or Kelley ever did, or attempted to do, anything in the matter before the board of supervisors, but it does appear that, after the money had been collected from the city upon the settlement between Taylor and Bonnet, Taylor deducted from Bonnet's portion \$250, which he paid to Kelley on the note. The fact that Taylor, who had in his hands all of the money collected on the judgments, only paid *one-half* of the \$500 note given by Bonnet to Buckley, strongly corroborates Bonnet's statement that at the time the note was given the agreement was that Taylor should pay one-half of it and he (Bonnet) the other half.

I cannot at all agree to what is said in the prevailing opinion with respect to the \$500 paid to Buckley by Taylor in the matter of procuring the advancement of the *Cases of Bonnet and Parker* on the calendar of the court. In so far as that matter has any bearing upon the charge in question, it strengthens the conclusion to which I have come. To believe that Taylor paid Buckley \$500 simply to go to some attorneys and ask if they had a case they did not wish to try, and in lieu of which they would agree that the *Bonnet and Parker Cases* might be placed, requires more credulity than I possess. As a matter of fact, the *Bonnet and Parker Cases* were advanced on the calendar by stipulation of the attorneys in the respective cases. Taylor, who was a real party in interest in the *Bonnet and Parker Cases*, and who, as appears, had frequent interviews with the attorney in them, either communicated the proposed arrangement with Buckley to the attorney, or he did not. If he did not, that circumstance of itself would strongly strengthen the suspicion that the ar-

arrangement was not of the peculiar character stated by Buckley and Taylor; if he did communicate the proposed arrangement to the attorney, can it be believed the latter would have advised or permitted his client to pay \$500 to effectuate an advancement of the cases on the calendar,—an advancement which, if practicable at all, could have been legitimately secured by the attorney. While, as has been said, the testimony is very conflicting, the circumstances corroborate the statement of Bonnet as to what the agreement was, and satisfies me that he told the truth about it. I therefore think the respondent should be adjudged guilty of the contempt charged, and should be punished accordingly.

I concur: MCKINSTRY, J.

MCKEE, J., (*dissenting*.) This is a proceeding to punish Christopher A. Buckley and J. W. Taylor for contempt. The charge is that on the tenth of May, 1884, Buckley represented to one B. Bonnet, a party to a cause then pending in this court, that he could influence the court and the members thereof to give a favorable decision in the cause; and that he undertook and agreed, for a large sum of money to be paid to him by Taylor and Bonnet, to influence the judges of the court to render a decision in the cause in favor of Bonnet.

The charge rests upon the testimony of Bonnet, Taylor, and Buckley, who were the principal parties to the transaction, which gave occasion for the charge. The testimony is very conflicting, but, after a careful sifting of the testimony, I find that the following constitute the facts and circumstances of the transaction:

In the year 1884 two cases were pending in this court, viz.: *Bonnet v. City and County of San Francisco* and *Parker v. City and County of San Francisco*, in which appeals had been taken from judgments rendered in the superior court of said city and county. On the morning of Saturday, the tenth of May, 1884, opinions in both cases, affirmatory of the judgments, were sent down by the court, then in session at Sacramento. Immediately after the opinions were filed in the clerk's office a telegraphic dispatch, in the name of the clerk of the court, was sent to the respondent, Buckley, as follows

"SACRAMENTO, 10th.

"To Chris Buckley, Bush Street, San Francisco: *Parker and Bonnet v. San Francisco*, judgments affirmed."

At 10:48 o'clock of the same day the dispatch was delivered at respondent's (Buckley's) saloon.

The only unusual thing in connection with the transmission of such a dispatch from the clerk's office of this court is that neither of the respondents was an attorney or counselor or party in either of the two cases, but both had connections with them. Taylor was assignee of the judgment appealed from in the *Bonnet Case* as security for the payment of a large sum of money, bearing interest at a high rate,

which he had advanced to Bonnet; and Buckley, in his testimony, states:

"About a year before \* \* \* I was asked by Taylor to do something about the cases. \* \* \* Taylor called upon me at my place of business and stated that he had an assignment,—I think *Bonnet* against *The City*,—and wanted me to procure some information for him from the city and county attorney's office in relation to the trial of this case; and also to see if I would go among my friends here—attorneys—and see if we could get a place on the calendar; get them substituted for the case that they might have on the calendar. \* \* \* *Question.* Did you get any money for that service? *Answer.* I did, sir. *Q.* How much money? *A.* Five hundred dollars. *Q.* Who paid it to you? *A.* Taylor. \* \* \* *Q.* Did you say that you went to the office of the supreme court for a calendar? *A.* Yes, sir. *Q.* Did you tell the clerk for what you wanted it? *A.* I might have told him so; I might have mentioned the circumstances to him. *Q.* You cannot tell whether you mentioned these two cases? *A.* I presume I did. I do not know."

Both Buckley and Taylor were therefore financially connected with the cases, and from that connection, and the testimony of Buckley, I think it fairly deducible that Buckley arranged in the clerk's office to receive immediate information of the filings of opinions in the cases when the court decided them; and that pursuant to such an understanding the dispatch of Saturday, the tenth of May, 1884, was promptly sent to him from the clerk's office. In this condition, being blind, he did not see or read the dispatch, but it was received and read; and I have no doubt that the person who received it informed Buckley of the fact of the affirmance of the judgments in the cases. Both Buckley and Taylor, therefore, knew, on Saturday morning, that the judgments of the supreme court in the cases had been affirmed. In fact, Taylor admits that on his examination before the bar association he confessed that on Saturday he "knew all about the affirmance of the judgments." Subsequently, it is true, on his examination before the court, he tried to break the force of his confession by saying that he was confused by the questions which were asked him. But it is also a fact that on Saturday, about 12 o'clock, M. Taylor met Bonnet on Montgomery street, and conveniently arranged with him for a secret interview with Buckley about the cases. For what purpose? Bonnet testifies that on Saturday he was utterly ignorant of the fact that the cases were decided, and intensely anxious to have them immediately decided; for, as Taylor testifies, Bonnet was complaining that the interest which he had to pay on the claims was "eating him up." In his necessity, and believing that Buckley had succeeded in getting the cases advanced on the calendar, although Buckley confesses "that the cases were in fact advanced without his aid or assistance," Bonnet corruptly conceived the idea that Buckley had personal and political influence enough to secure a speedy decision of the cases in his favor. This he believed until it became in his mind a fixed idea; and when he met Taylor, on Saturday at noon, he readily proposed or consented to an arrangement for an interview with Buckley for the purpose of putting that idea into opera-

tion. Upon the subject and object of the interview both Taylor and Bonnet were of one mind, for it is a fact that Taylor, before starting, prepared himself with the printed form of a promissory note, and in going to the interview encouraged Bonnet by telling him as they went: "Buckley can get a judgment for you right away." They got to Buckley's place of business about 8 or half-past 8 o'clock at night. Bonnet testifies:

"When we got there Buckley invited us inside his private place, and there he said to me: 'You got a case in the supreme court?' I told him: 'Yes.' He then said: 'I can get judgment for or against you in the cases.' \* \* \* Then Taylor said: 'I suppose the judges will be down here to-night or to-morrow;' and Buckley said: 'Oh, yes; there is two already here.'"

At this point in the conversation Bonnet and Taylor retired to a corner of the room, where Taylor drew from his pocket the promissory note for \$500, which Bonnet had signed, or then signed, with the understanding that Taylor was to pay half of it; and they then returned and delivered it to Buckley, saying: "We do not want your services for nothing. We are willing to agree to pay you for it if you will assist us to have this matter brought up. We will pay you \$500, and to secure your payment of it will give you a note," which, says Buckley, they did, "and I agreed to assist them, and do what I could in the matter."

The fact is, then, fairly established that on Saturday, that day the telegraphic dispatch from the then clerk of the court was delivered at Buckley's place of business, the secret interview took place at the room and place testified; and that the result of the interview was the execution and delivery to Buckley of a note for \$500 for personal or political services to be rendered by him in the cases. So far not the slightest conflict exists in the testimony. The three men agree that a night conference was held, and that a corrupt arrangement was made for securing Buckley's services for some purpose in connection with the cases. But Buckley testifies that the statements of Bonnet as to the services to be rendered are wholly false, and so Taylor testifies. Both tell the same story, namely, that the note was given to secure the personal services of Buckley for the purpose of influencing members of the board of supervisors to pay the claims. Is that true?

I find the story improbable because there is one thing beyond controversy, and that is that Buckley and Taylor, on Saturday, knew, or did not know, of the decision of the cases. If they did *not* know, then they did know, or had every reason to believe, that the cases were still pending and undetermined, and that the claims involved in them were not collectible from the city or enforceable against it. Bonnet did *not* know that the cases were decided. That is manifest from the circumstance that the fact of filing the opinions in the cases on Saturday was not publicly announced until the following Monday, when it was published, for the first time, in the San Fran-

cisco *Evening Bulletin*. Being alike ignorant that any decisions had been rendered in the cases, it follows that none of these parties could have been actuated by any motive to meet together to make a corrupt arrangement for the collection of claims which the city was contesting in the courts, and there was no reason why either Bonnet or Taylor should attempt to bring personal or political influences to bear upon members of the board of supervisors to pay claims upon which they could not then act.

On the other hand, if Buckley and Taylor knew that the cases were decided, then they used their knowledge as a veil to cover the pretense held out to Bonnet that Buckley could get a decision of the court in his favor "right away;" and, in either case, I think the truth of Bonnet's testimony as to what transpired at the private interview on Saturday night is substantially proved,—proved not only by all the circumstances of the interview itself, but by the subsequent conduct of the parties to it. Taylor admits that, upon a division of the spoil among the persons who had become, one way and another, interested in the case, he applied \$250 of Bonnet's portion to the payment of the note, and that he himself refused to pay any part of it; and although Buckley testifies: "I was to receive \$500 to aid these gentlemen in bringing these matters up before the board of supervisors; that is my understanding of it,"—yet he virtually admits no such understanding, expressed or implied, existed at the interview, by confessing that he neither took action, nor thought of acting, upon such an understanding. On his examination upon that subject he answered as follows:

"*Question*. You were to go to them—the members of the board of supervisors—privately? *Answer*. I presume so. *Q*. To speak to each member? *A*. I should judge so. *Q*. And ask them to pay these claims? *A*. No, sir; to ask them to bring bills up and act upon them. *Q*. Did you make any request of any supervisor? *A*. No, sir; I did not. *Q*. Did you go before any committee of the board or to any member on this subject? *A*. I did not. *Q*. Did you go to the board in session? *A*. No, sir. *Q*. Did you go to any member of the board? *A*. No, sir. *Q*. What did you do for this \$500. *A*. Nothing."

From the conduct and acts of the men I therefore deduce the fact that the note was not given to pay Buckley for influencing the members of the board of supervisors, but that it was given for the purpose testified by Bonnet.

I do not overlook the fact that Bonnet is an accomplice to a corrupt transaction, and that his testimony is tainted, and needs corroboration, but I find it corroborated, not by words, but by the acts and deeds of Buckley and Taylor, as they themselves have testified.

The question then remains: Is one who falsely holds himself out as a court broker to a suitor in a cause pending in the court, and agrees for a large sum of money to procure for him a favorable decision in the cause, by his professed personal or political influence with the members of the court, guilty of contempt of court? I think

it needs neither argument nor authority to show that such an act is a contempt of court. The thing is evil, immoral, invalid, and criminal. Any contract founded upon such a transaction would be illegal and void, and unenforceable in the courts; and, under the code law of this state, it is in itself, and independent of any attempt at fulfillment, a contempt of court. The law declares: "Any interference with the \* \* \* proceedings of a court is a contempt of court." Subdivision 9, § 1209, Code Civil Proc. To dissuade a witness in a cause from attending court to testify in the case is an unlawful interference with the proceedings of the court; to threaten, by letter or otherwise, a suitor in a cause pending in court, against prosecuting it, is an unlawful interference with the proceedings of the court; to falsely pretend to a suitor in a cause that jurors trying it can be corruptly influenced with money to return a favorable verdict for him is an unlawful interference with the proceedings of the court; and *a fortiori* is it, when such corrupt pretense is held out to a suitor about the judges of the court, for the purpose of extorting money from the suitor for such a purpose.

In support of these propositions numerous cases might be cited. All the authorities, indeed, tend to the same point; they show that it is immaterial what measures are adopted. If the object is to taint the source of justice, and to obtain, or profess to be able to obtain, a result of legal proceedings different from that which would follow in the ordinary course of proceedings, it is a contempt of the highest order. "One," say the supreme court of Indiana, "who does a wrongful act for the purpose of bringing unmerited disgrace upon the officers of the court, or the members of the jury, is guilty of a contempt. One who, for the purpose of securing money for himself, falsely pretends to another, interested in the result of the cause, that he can corruptly influence with money the jurors trying the cause to return such a verdict as he desires, is guilty of a contempt. Such an act tends to disgrace and degrade the jury in the mind of the person to whom the corrupt proposition is submitted. No man has a right to falsely insinuate that he can, by corrupt means, influence jurors in the performance of their duty. It would be a reproach to the law, if shameless men were permitted to slander honest officers and jurors by vile insinuations." *Little v. State*, 90 Ind. 338.

(2 Cal. Unrep. 648)

*In re* TAYLOR. (No. 20,135.)

Filed February 27, 1896.

ORDER TO SHOW CAUSE DISCHARGED, AND PROCEEDINGS DISMISSED.

In bank. Proceedings against respondent for alleged contempt of court.

*The Attorney General*, for the prosecution.

*Preston & McPike* and *D. H. Regensburger*, for the defense.

By THE COURT. This cause is ruled by the decision in the case entitled "*In re Buckley*, charged with contempt," *ante*, 69, (No. 20,-136,) and therefore it is ordered that the order to show cause herein be discharged, and the proceedings dismissed.

We dissent: ROSS, J.; MCKINSTY, J.; MCKEE, J.

## SUPREME COURT OF KANSAS.

(35 Kan. 1)

KANSAS CITY, ST. J. &amp; C. B. R. Co. and another v. GOUGH and another, Partners, etc.

Filed March 5, 1886.

## 1. ERROR—CASE MADE—FINDINGS SUSTAINED BY EVIDENCE.

Where a case made shows that all of the evidence offered upon the trial to sustain a particular finding of fact of the trial court is preserved therein, the supreme court can decide whether such finding is sustained by any evidence, although all of the evidence presented upon the trial upon other issues of fact is not embraced in the record.

## 2. EXECUTION—EXEMPT PROPERTY—EARNINGS OF DEBTOR.

The earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt, under section 490 of the Civil Code and section 157 of the justices' act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the statute of the state does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore no distinction is to be made between residents and non-residents.

## 3. CONFLICT OF LAWS—EXEMPT PROPERTY—GARNISHMENT IN ANOTHER STATE.

Where a citizen of this state attempts, by a proceeding in garnishment against a foreign railroad corporation, to subject to the payment of his claim, in the courts of this state, the personal earnings of a citizen of another state, which personal earnings are by the laws of this state, and also of such other state, exempt from being so applied, the earnings of such debtor are exempt from such process. *Burlington & M. R. R. Co. v. Thompson*, 81 Kan. 180, 8. O. 1 Pac. Rep. 622, distinguished.<sup>1</sup>

Error from Atchison county.

On March 7, 1884, W. M. Gough and J. M. Linley, partners as Gough & Linley, filed their bill of particulars against the Kansas City, St. Joseph & Council Bluffs Railroad Company, alleging that on January 23, 1883, they brought their action before a justice of the peace of Atchison county against Jesse Gaut for \$20, and that in said action, upon due proceedings, certain money due to said Gaut was garnished in the hands of the railroad company; that on February 3, 1883, judgment was rendered in favor of the plaintiffs against said Gaut, by the justice, for \$20, and costs of suit, taxed at \$11.85, of which \$5 were costs of the proceeding against the garnishee in the action; that on February 3, 1883, the railroad company filed its answer as garnishee, and disclosed \$20 due by it to said Jesse Gaut; that on February 15, 1883, an order was issued by the justice of the peace to the railroad company to pay the said \$20 into court, to be applied upon the judgment against Gaut; that the order was served on the company, but has never been complied with; that on January 14, 1884, a second order was issued by the justice and served upon the railroad company to pay the money into court, which second order was likewise disobeyed; that the judgment in favor of plaintiffs against the said Gaut is in full force, and wholly unpaid.

<sup>1</sup>See note at end of case.

Therefore the plaintiffs demanded judgment against the company for the sum of \$20, and interest from February 15, 1883, and costs. Trial had before the justice on April 14, 1884, and judgment rendered in favor of plaintiffs for \$25.94, and costs, taxed at \$5.80. Subsequently the railroad company appealed the case to the district court. With leave of the court Jesse Gaut was made a party, and filed his answer, to which plaintiffs filed a reply. Trial had July 28, 1884, a jury being waived by the consent of the parties. The court made the following findings of fact:

"(1) The plaintiffs are, and for several years last past have been, partners in business as physicians and surgeons at Atchison, in Atchison county, Kansas. As such, during the year 1882, they rendered professional services to the family of Jesse Gaut, then residents of Atchison, Kansas, at the request of said Jesse Gaut; but prior to January, 1883, said Jesse Gaut and his family removed from Atchison, Kansas, to St. Joseph, Missouri, where they have ever since lived and resided as their home.

"(2) On January 23, 1883, the plaintiffs commenced an action against said Jesse Gaut before R. B. DRURY, a justice of the peace of Atchison county, Kansas, to recover the sum of \$20.00 for said professional services of the plaintiffs, and at the same time they caused proceedings in garnishment to issue to said defendant railroad company as garnishee. On February 3, 1883, said railroad company answered as garnishee to the effect that said Jesse Gaut, as an employe of the garnishee, had performed services for it ever since January 1, 1883, and had earned \$20 for said services, which would become due and payable February 15, 1883, and that said sum was for the last thirty days' wages of said Jesse Gaut as an employe of the garnishee; and at the same time said railroad company filed a verified motion for a discharge as garnishee, and the affidavit of said Jesse Gaut was also then and there filed asking said wages be declared exempt to him. Neither the answer of the garnishee, the verified motion of the garnishee, nor the affidavit of said Jesse Gaut, showed that such wages or earnings of said Jesse Gaut were necessary for the maintenance or use of a family supported wholly or partly by his labor, and said fact was not in any other manner made to appear. On February 10, 1883, said Jesse Gaut appeared by his attorney in said action, who was also the attorney of said railroad company, and a trial was had, which resulted in a judgment in favor of the plaintiffs against said Jesse Gaut for \$20 debt, and \$8 costs. On February 15, 1883, the plaintiffs and said Jesse Gaut and said railroad company appeared, and said verified motion for discharge of garnishee came on to be heard, and the answer of said garnishee and said verified motion and said affidavit of Jesse Gaut, all filed February 3, 1883, as aforesaid; and also the exemption statutes of Missouri were presented to the justice, which was all of the evidence produced. And thereupon said justice overruled said motion for discharge of the garnishee, and for declaring said money exempt, and made an order for the garnishee to pay said sum of \$20 into the hands of said justice to apply upon said judgment and costs; to which rulings and orders said Jesse Gaut and said railroad company then and there duly excepted. On February 22, 1883, a bill of exceptions was duly allowed to said railroad company as garnishee, and signed and filed by the justice. On January 14, 1884, said justice made another order for said railroad company as garnishee to pay in said money in satisfaction of said judgment and costs, the total costs to that time being taxed by the justice at \$11.85. No part of said money has ever been paid in by the garnishee, and no part of said judgment or costs has ever been paid, and said judgment remains in full force and unsatisfied.

"(3) Up to the time of the garnishment, January 23, 1883, the amount of wages earned by said Jesse Gaut was fully \$20 for January, but at the end of the month his wages had amounted to \$43.20, but the same was not payable until February 15, 1883. Before the time for answer of the garnishee said Jesse Gaut notified said garnishee that he claimed said wages of \$43.20 as exempt.

"(4) Said railroad company, as garnishee, instituted proceedings in error in this court to reverse the order of the justice of the peace requiring the garnishee to pay said sum of \$20 into the hands of said justice to apply on said judgment, but afterwards said proceedings were dismissed by order of this court. No proceedings in error were ever instituted by said Jesse Gaut, and he supposed, until about Christmas time, 1883, that said money had been so paid in accordance with said order of the justice of the peace. Said railroad company retained \$20 out of the January earnings of the said Jesse Gaut, and paid him the balance. After this action was commenced said railroad company also retained \$5 more out of his subsequent earnings, but did not explain to him, and he did not know the reason for so doing. After the order of the justice of the peace was made said Jesse Gaut did not desire any further litigation, but was willing that said sum of \$20 should be applied towards the satisfaction of said judgment; and the defense of this action by said railroad company was made without the knowledge of said Jesse Gaut until about June, 1884, and it was at the solicitation of said railroad company that he consented to be made a party to this action in this court.

"(5) On the trial of this action the facts stated on conclusion of fact No. 1 were made to appear; and also the further facts that the plaintiffs' claim was for professional services as physicians; that the \$20 garnished in said former action was for earnings of said Jesse Gaut for his personal services for said railroad company within less than three months next preceding the commencement of said garnishment proceedings; and that such earnings were and are necessary for the maintenance and use of the family of said Jesse Gaut, who were and are supported wholly by his labor."

And thereon made the following conclusions of law:

"(1) The plaintiffs are entitled to recover of the Kansas City, St. Joseph & Council Bluffs Railroad Company, defendant, the sum of \$20, with interest thereon from February 15, 1883, (\$2.03,) amounting to \$22.03, and costs of suit."

Judgment having been rendered in favor of the plaintiffs against the defendants for \$22.03, and all costs, the defendants properly excepted thereto, and bring their case here.

*Jackson & Royse*, for plaintiff in error.

*Hudson & Tufts*, for defendants in error.

HORTON, C. J. Two questions are presented in this case: *First*. Are the findings of fact supported by the evidence? *Second*. Are the personal earnings of Jesse Gaut, due to him from the Kansas City, St. Joseph & Council Bluffs Railroad Company, exempt from the payment of the judgment recovered against him by Gough & Linley?

The disputed finding of fact is as follows:

"After the order of the justice of the peace, of February 15, 1883, overruling the motion for the discharge of the garnishee and denying the exemption, said Jesse Gaut did not desire any further litigation; but was willing

that said sum of \$20 should be applied towards the satisfaction of the judgment."

The only evidence in the record that we can find tending in any way to support this conclusion of fact is as follows: Jesse Gaut testified:

"I owe Gough & Linley, who are physicians in Atchison, for attendance upon my wife. Have wanted and intended to pay them what I owe them, but my wife has been weakly, and it has cost me my wages to live and support my wife and child. The railroad company first notified me that it had been garnished for \$20 on January 23, 1883. They kept that amount out of my wages, and paid me the balance due. After that, and along in January, 1884, I was notified that the company was garnished again for it; but after learning it was garnished on the same old case they paid me all that was due, excepting \$25 which was due me for my personal earnings at that time."

On cross-examination he further testified:

"I don't know how many trips I made, or how much I made in January, 1883, before the twenty-third of the month. The railroad company kept back \$20 of my January wages for 1883, and told me I was garnished again in January, 1884, and kept back \$5 more. I supposed the \$20 had been paid to Gough & Linley until after the other money was kept back. I wrote a letter to Dr. Gough after the \$5 was kept back. I don't think I said I was willing to have that debt paid out of the money, and have never signified my willingness to pay the debt out of this money. I wrote the letter to Dr. Gough about last March. Didn't write that I wanted it [the debt] paid, and supposed it had been. I wrote that they had garnished me once before for that debt, and wanted to know what they had garnished my wages again for. When I was notified of the first garnishment I went to the office of JOHN TAYLOR, a justice of the peace in St. Joseph, and told that I had been garnished, and stated the facts, and a young man in the office wrote a notice to the railroad company that I claimed all the earnings due me as exempt from execution or attachment. I signed and swore to it, and then delivered it to Mr. Carter at the superintendent's office of the railroad company."

Dr. W. M. Gough testified as follows:

"I received a letter about Christmas from Jesse Gaut. It is lost. I think he said in that letter that \$20 or \$25 more had been kept out. I think he said he intended to pay the debt, and that it had been paid, but would not pay it twice. I never got anything on this debt. He never denied owing the debt to me. He complained that his wages were garnished twice on the debt. I cannot recollect exactly what was in the letter. I have stated the substance, as I remember it."

It further appears from the record that Gough & Linley commenced their action against Jesse Gaut, and garnished the wages due him from the railroad company, on January 23, 1883. On the same day he served a written notice upon the railroad company, signed and sworn to by him, claiming all the wages due to him as exempt from execution or attachment. Then, on February 3, 1883, the railroad company answered as garnishee that the moneys due Gaut were his wages as an employe and exempt, and at the same time the affidavit of Gaut was filed before the justice asking his wages to be declared exempt to him. On February 10, 1883, Gaut appeared by

his attorney to defend the action, in which a judgment was rendered against him. On February 15, 1883, Jesse Gaut, and also the railroad company, appeared before the justice, and presented the statutes of Missouri, claiming that the wages garnished were exempt. After the order of February 15, 1883, was made for the garnishee to pay the \$20 into the hands of the justice to apply upon the judgment and costs, nothing further was done towards the enforcement of this order until January 14, 1884, when the justice made another order for the railroad company, as garnishee, to pay the money in satisfaction of the judgment and costs. The railroad company refusing to comply with the order, the plaintiffs filed their bill of particulars on March 7, 1884, asking judgment in their favor and against the defendants for the \$20 garnished, with interest from February 15, 1883, and also for all costs. The railroad company filed its answer on April 12, 1884. Judgment was rendered against the company on April 14, 1884, for \$25.94, and costs taxed at \$5.80; the case was then appealed by the railroad company to the district court. On June 24, 1884, Jesse Gaut presented his motion for leave to be made a defendant, and to file his answer. This was granted, and his answer filed. Ever since he has continued to be vigilant in claiming his exemption.

Upon the oral evidence and the records before the justice of the peace and the district court we do not think that there is any evidence to support the finding that Gaut did not desire any further litigation, or was willing that the sum of \$20 should be applied in satisfaction of the judgment rendered before the justice of the peace. The most that can be said is that he supposed when the railroad company retained \$20 they had paid it to Gough & Linley; but when he found this was not the case he was anxious to claim all his wages as exempt. "Until the right of exemption is waived or lost by some unequivocal act or declaration of the debtor, it remains with him, and any of his property which is included within the terms of the statute is beyond the reach of the officer and his process." *Rice v. Nolan*, 33 Kan. 28; S. C. 5 Pac. Rep. 437. Counsel for plaintiffs below suggest that as all the evidence is not preserved the findings of the court are conclusive. The record, however, shows that upon the disputed findings of fact all of the evidence that was offered is embraced therein.

It is the claim of defendants below that the judgment of the district court was rendered upon the finding that Gaut was not a resident of this state at the time of the garnishment. If such was the ruling it was erroneous. "Under the statute the earnings of a debtor for his personal services, at any time within three months next preceding the attempt to subject such earnings to the payment of his debts, are exempt from such payment, if it be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family, supported wholly or partially by his labor; and no dis-

inction is made by the statute between residents and non-residents, or between debts created in Kansas and debts created elsewhere; and the weight of authority seems to be that where the statutes do not make any distinction that no such distinction exists; that if the statutes do not restrict the exemption of property for the payment of debts to residents, or to some other particular class of persons, the courts have no authority to make such restriction, and the statute will apply to all classes, non-residents as well as residents." *Railway Co. v. Maltby*, 34 Kan. —; S. C. 8 Pac. Rep. 235; *Zimmerman v. Franke*, 34 Kan. —; S. C. 3 Kan. Law J. 29, and 9 Pac. Rep. 747.

In *Railroad Co. v. Thompson*, 31 Kan. 180, S. C. 1 Pac. Rep. 622, the case was discussed and decided whether the exemption laws of Nebraska have force in this state, the trial judge remarking that "the showing was insufficient to sustain the exemption under the laws of Kansas;" and in the conclusion of his opinion said: "The garnishee has not made out a case of exemption for its creditor here under our statute, which governs us, and which we must follow in preference to the Nebraska statute." If it be claimed that the judgment rests upon the adjudication of the justice refusing to set aside the garnishment and discharge the fund as exempt, it is sufficient to say that such an order is not conclusive. Such a ruling is neither a judgment nor a final order, and is not reviewable by proceedings in error. Neither the railroad company nor Gaut could successfully have instituted proceedings in error in the district court. *Zimmerman v. Franke*, *supra*; *Miller v. Noyes*, 34 Kan. —; S. C. 7 Pac. Rep. 602; *Board of Education v. Scoville*, 13 Kan. 32; *Phelps v. Railroad Co.*, 28 Kan. 169; *Mull v. Jones*, 33 Kan. 112; S. C. 5 Pac. Rep. 388.

We think there is nothing whatever in the suggestion that Gaut was not properly a party to this action in the district court, or that the exemption had been lost by lapse of time. The last finding of the court shows that the money garnished was for the earnings of Gaut for his personal services for the railroad company within less than three months next preceding the garnishment proceeding, and that the earnings were and are necessary for the maintenance and use of his family, who were and are supported wholly by his labor.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

#### NOTE.

A debt due from one who may be sued in this state to a *non-resident* of this state, for services performed in the state of his residence, may be garnished in a suit instituted against him in the courts of this state, personal service or service by publication having been duly made on him, although his salary has always been paid in the state where he lived, and would have been exempt by the laws of that state. *Mooney v. Union Pac. Ry. Co.*, (Iowa,) 14 N. W. Rep. 343; *Oberfelder v. Union Pac. Ry. Co.*, (Iowa,) 14 N. W. Rep. 255.

The exemption laws of another state or territory cannot be pleaded or relied upon as a defense by either the garnishee or the judgment debtor in a proceeding in Iowa.

*Broadstreet v. Clark*, (Iowa,) 22 N. W. Rep. 919. The court say: "We regard it as the settled rule in this state that the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor;" citing *Newell v. Hayden*, 8 Iowa, 140; *Leiber v. Union Pac. Ry. Co.*, 49 Iowa, 688; *Mooney v. Union Pac. Ry. Co.*, (Iowa,) 14 N. W. Rep. 343; and *Burlington & M. R. R. v. Thompson*, (Kan.) 1 Pac. Rep. 622.

It was held in *Albrecht v. Treitschke*, (Neb.) 22 N. W. Rep. 418, that where a judgment creditor procures the exempt wages due a laborer to be taken by garnishee process, and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor.

(35 Kan. 10)

### MANN v. BURT and others.

Filed March 5, 1886.

#### 1. RAILROAD COMPANY—CONSTRUCTION—CONTRACTOR'S BOND.

Where a railroad company takes from the contractor engaged in the construction of its road a good and sufficient bond, such as is required by chapter 136 of the Laws of 1872, it cannot be held liable for the debts due from the contractor for labor and material which go into the building of such road. The filing of the bond in the office of the register of deeds is not a condition precedent to immunity from such liability.

#### 2. SAME—TEAMSTER A LABORER.

A teamster employed by a contractor in the construction of a railroad is a laborer within the meaning in which that term is used in the statute above mentioned.

#### 3. SAME—DEBTS DUE FOR USE OF TEAMS.

The railroad company cannot be held liable for the debts due from the contractor for the labor of teams in constructing the road, whether such labor was used in connection with the services of the person furnishing the same or not.

#### 4. SAME—LIABILITY OF COMPANY.

Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable.

#### Error from Cowley county.

Action brought in the district court of Cowley county, under the provisions of chapter 136 of the Laws of 1872, in which the plaintiff alleged that the defendant company had failed to take the bond from the contractor who constructed a portion of its road, and he asked that the company be held liable for certain labor performed for the contractor upon the road, and for which he had not paid. The answer of the railroad company was a general denial, to which was added the following defenses:

"(2) And for a second and further defense to the action of the plaintiff this defendant avers that on the twentieth day of August, A. D. 1879, it entered into a contract with the defendant Bernard Corrigan for the construction of its road-bed through the county of Cowley, state of Kansas, and thereafter required and took from said defendant Bernard Corrigan the bond in such cases required and prescribed by law, a true copy of which said bond is hereto attached marked 'Exhibit A,' and made a part of this the second cause of defense in this answer contained; which said bond, and the security thereon signed and therein named, the defendant avers was at the date thereof, and ever since has been and now is, good and sufficient in every particular. [The exhibit attached was a contractor's bond in the usual form.]

"(3) And for a third and further defense to the action of the plaintiff this defendant avers that if any contract ever existed between the defendant Bernard Corrigan and the J. D. Burt in the petition of the plaintiff mentioned, in form and substance as in and by said petition set forth and alleged; and if the several persons mentioned in the said petition ever were employed or performed labor in the construction of this defendant's line of railroad, as in said petition alleged,—said persons, and each and all thereof, were employed by said Burt in the capacity of foreman, clerks, time-keepers, and teamsters in connection with teams of horses or mules owned or controlled by them, respectively, and under such employment, and in pursuance thereto, performed any and all such labor as such foreman, clerks, time-keepers, and teamsters owning or controlling such teams respectively, and not otherwise, and at and for an agreed price per day for the services so rendered, which price, so far as it related to said teamsters and teams, was based upon and comprised the value of the joint labor of said teamsters and their said team or teams per day, or by the job, as the case might be, and not otherwise."

The plaintiff demurred to each of the second and third defenses, which demurrer was heard by the court, and overruled. This ruling is assigned for error here.

*Jennings & Troup*, for plaintiff in error.

*W. P. Hackney*, for defendants in error.

JOHNSTON, J. The question raised by the demurrer to the second defense is, upon what contingency does the liability of the railroad company for the debts of the contractor who constructed its road depend? It is alleged that the company took from the contractor a good and sufficient bond,—such as is provided for in chapter 136 of the Laws of 1872,—but it is not averred that the bond was filed by the railroad company in the office of the register of deeds of the county where the work was done. The omission of this averment is the ground of demurrer relied upon by the defendant. On the part of the plaintiff it is urged that before the railroad will be exempt from liability for the debts of the contractor it must not only have taken a bond, but it must also have filed the same in the office of the register of deeds; while the claim of the company is that, to escape such liability, it was only required to take a good and sufficient bond, and this it alleges it had done. We agree with the defendant. The statute is so written. Its terms are plain and unmistakable. The language fixing the liability of the railroad is:

"And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor." Section 1, c. 136, Laws 1872.

Thus, it will be seen that the filing of the bond is not a condition precedent to be performed by the railroad company before it can claim immunity from the payment of the debts mentioned in the statute. It is true that in a preceding part of the statute it is made the duty of the company to file the bond in a public office, and we might agree with the plaintiff that it would add much to the convenience of persons who desire to avail themselves of the benefit of the bond to have

required it to be filed before the company would be freed from liability; but when the legislature came to fix the condition upon which the liability of the company should arise it provided that it should be liable if it failed to *take* a bond, and not if it failed to take and *file* the same, and the inconvenience occasioned, or the impolicy of the statute, are not considerations for the court. We are reminded that the statute should be construed so as to advance rather than defeat the remedy intended by the legislature, but we must also remember that it is a statute imposing an additional liability under which it is sought to make the company responsible for a debt which it never contracted, and we have before decided that "such a statute should never be extended beyond the fair import of its terms." *Railway Co. v. Baker*, 14 Kan. 563. The failure to require the bond to be filed, it is true, is an inconvenience, but it does not thwart the purpose or defeat the remedy intended by the legislature. The debtors are secured either by the bond or by the company. If a good and sufficient bond has been taken, the responsibility of the company ceases; and that it will conceal the bond, or the fact that it had been taken, from the persons interested, is an unlikely supposition, as it would be against its own interest, and would probably tend to subject it to embarrassment and litigation, if for any reason the company should fail to file the bond, or, upon request to produce or make known what it was, the parties interested could, by taking the proper legal steps, obtain copies thereof, or compel its production. However, the legislature has expressly stated, in language not open for interpretation, the conditions upon which the liability of the company depends, and the courts cannot add to them. We think the demurrer was rightly overruled.

In the third cause of defense it is alleged that the persons for whose services the action was brought were employed in the capacity of foreman, clerks, time-keepers, and teamsters in connection with their teams. It is settled by a decision of this court that persons in the employ of a contractor as foreman, clerks, and time-keepers are not laborers in the sense in which that term is used in the statute, and therefore not within its protection. *Missouri, K. & T. Ry. Co. v. Baker*, *supra*. None of the terms employed in the statute are broad enough to include persons who merely furnish one or more teams to work for the contractor. The persons who fall within its protection are enumerated and are "laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind." The railroad company, therefore, cannot be charged with such labor, even though it be given in connection with the personal services of the owner of such teams. *Balch v. Railroad Co.*, 46 N. Y. 521; *Groves v. Railroad Co.*, 57 Mo. 304. It is different, however, regarding the personal services of the teamster. The work performed by him in driving the team, handling a plow, and loading and unloading scrapers and wagons, is such as to constitute him a "laborer" within  
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the meaning of that term as used in the statute. The principal part of the work performed by him is ordinary manual labor, and if the compensation for his work is distinguishable from that performed by the team which he drives, he may, where no bond has been taken, charge the railroad company for the same. In this case, however, it is alleged that the services performed by the teamster and his team were for an agreed price per day for the joint labor of such teamster and team. He was not employed separately. The part which was performed by him was mingled and confused with that performed by the team, and the indebtedness for the same constituted a single demand. There is therefore no mode of ascertaining the amount due from the contractor for the personal services of the teamster. In a case somewhat similar to this it was said:

"Another difficulty in the judgment as it stands is that it makes a new agreement between the plaintiff and the railroad contractor. The foundation of the liability of the corporation is the debt due to the laborer from the contractor. In this case the contract was entire for the labor of the plaintiff, his man, and two teams; the debt is also entire, and arises out of the performance of that contract. Now, it appears to me, the defendants cannot be made liable for a part of the services when confessedly they are not for another part, the whole being performed under one entire agreement. The true obligation of the contractor was to pay for the whole as a unit, and I do not see how this can be split into two parts for the purpose of enforcing one of them against the company. The recovery against the corporation must be according to the agreement of the contractor and his obligation arising under it to the laborer. If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employer alone upon his contract." *Atcherson v. Troy & B. R. Co.*, 6 Abb. Pr. 329. See, also, *Balch v. Railroad Co.*, *supra*.

If, upon the further trial of this cause, it is found that the agreement between the teamsters and the contractor was not an entirety, and did not constitute a single demand, but that the personal services of the teamsters are distinguishable from the labor performed by the teams, the plaintiff may recover for such personal services, provided the railroad company is liable at all. The allegations of the answer, however, make the debt due from the contractor for the teamster and his team a single demand, and therefore the ruling of the court upon the demurrer was correct.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(35 Kan. 21)

## CITY OF WYANDOTTE v. CORRIGAN.

Filed March 5, 1886.

## 1. STREET RAILWAY—REGULATION—TAXATION.

A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when it should be constructed, and the manner in which it should be maintained. *Held*, that the grant thus made will not exempt the corporation from reasonable regulation by the city in the operation of the road, nor will it prevent the city from levying and collecting a license tax thereon.

## 2. SAME—GRANT OF FRANCHISE, HOW CONSTRUED.

Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public.

## 3. SAME—LIABILITY OF AGENT—FAILURE TO PAY LICENSE TAX.

An agent or employe of such corporation who knowingly operates, or assists in operating, a street railway, when the license tax imposed on such business is unpaid, will be liable to prosecution and punishment, as prescribed by the ordinance.

Appeal from Wyandotte county.

Prosecution for the violation of ordinance No. 448 of the city of Wyandotte, in the police court of the city, where the defendant was convicted. He appealed to the district court, and was there tried and again convicted. The ordinance for the violation of which the defendant was prosecuted was entitled "An ordinance regulating the collection of a license tax on the corporations herein named." Section 1 of the ordinance provided:

"That it shall be unlawful for any person or persons, firm or corporation, to transact, engage in, or pursue any business or vocation, or to do any act, or make any exhibition hereinafter named, described, or specified, in the city of Wyandotte, without first having paid such sum or sums, and obtained a license so to do, as hereinafter provided or required."

Section 2 provided that—

"There shall be charged and collected for every license granted for any business or occupation or object herein named and specified, as follows."

After enumerating the sums to be charged and collected for other business occupations and objects, section 26 provides that there shall be charged and collected "upon a street railway company's license one hundred dollars (\$100) per year."

Section 36 of the ordinance provides that—

"Whoever shall violate, or neglect or refuse to conform to or to observe the preceding provisions of, this ordinance, and any or either of them, by carrying on or engaging in any business, occupation or profession named in this ordinance without having first taken out a license, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not to exceed one hundred dollars, (\$100.)"

In 1871 the mayor and council of the city of Wyandotte enacted an ordinance authorizing the Kansas City & Wyandotte Street Railway Company to construct and operate a street railway upon certain streets and avenues within the city. This ordinance was

amended in 1881 by ordinance No. 330. Section 3 of the amended ordinance provided:

"The said street railway company shall construct a second or double track along and upon such parts of the said streets and avenues as they now are operating their road upon, and shall construct said track along-side of the one now laid, and upon the side and in the manner that shall be designated by the city engineer, the said track to be laid and completed on or before, and said road shall be maintained and operated as a double-track road from and after, the first day of July, 1881; all of said new track to be laid with flat rails, so as not to interfere with public travel; and said company to keep said track of said road up to the established grade of said streets, and to keep the same in good repair; also, the space occupied by its track, and the space between the tracks, to be four feet in width.

"Sec. 4. The said railway company shall, within thirty days after the passage and approval of this ordinance, make such running arrangements with the Jackson County Horse Railroad Company, of Kansas City, Missouri, as to run all of the cars of the Kansas City & Wyandotte Railway Company through without change from the western terminus of the said road, in the city of Wyandotte, to the public square, in the city of Kansas, Missouri, making a through line of said roads, on which through line there shall be, at all reasonable hours and times, run at least twelve cars.

"Sec. 5. The said railway company may collect fare as follows: For every person over the age of five years riding in said cars, five cents, and no more, for one trip over said road, or any part thereof, between the state line and any point in the city of Wyandotte to which said road shall run, or *vice versa*.

"Sec. 6. The said railway company shall be entitled to the rights, privileges, and benefits of this ordinance for the full term and period of twenty-one years from and after this ordinance takes effect."

The cause was tried in the district court upon an agreed statement of facts, which is as follows:

"It is agreed by the parties hereto that said railroad is operated only on the streets specified; that Thomas Corrigan, the defendant, on or about the twenty-second day of March, 1884, was the general manager of a street railway company running and operating cars in the city of Wyandotte under ordinance No. 330, and the ordinance of which the same was amendatory; and said defendant, on said day, did run and operate said cars and said street railway without first having procured any license therefor, or paid any license tax thereon, as provided by ordinance No. 448. All other questions are waived."

The trial resulted in a conviction of the defendant, and he was adjudged to pay a fine of \$25, with the costs of prosecution, from which fine and judgment he appeals to this court.

*Henry McGrew*, for appellee.

*John C. Tarsney*, for appellant.

JOHNSTON, J. The mayor and council of the city of Wyandotte, by an ordinance adopted in 1871, which was amended in 1881, authorized the Kansas City & Wyandotte Street Railway Company, of which the appellant is general manager, to construct and operate a street railway upon and along certain streets and avenues within the city. In the ordinances granting the franchise it was provided that it should be constructed and maintained as a double-track railway; that the tracks should be laid flush with the streets, and with flat rails, so as not to interfere with public travel, and should be kept in good repair;

also that the company should operate its railway in connection with one in Missouri, so that cars should be run over both lines without change, making a through line on which cars shall be run at all reasonable hours and times, and further providing a maximum fare which should be charged for transportation over the company's line. From the record presented in this case it does not appear that any other duties or obligations were imposed upon the company by the ordinance granting the franchise, nor does it appear that they contained any express exemption from municipal regulation or control, nor from the liability of others doing business within the city.

The defendant urges that the granting of the franchise, and its acceptance by the company, constituted a contract within the protection of the federal constitution, which could not be impaired by any subsequent legislation of the city without the assent of the company; and he contends that no other or different conditions or burdens could be imposed than those mentioned in the ordinances, and therefore that the license tax could not be enforced against the company, or any of its agents. It may be conceded that the grant and its acceptance constituted a contract the obligation of which comes within the protection invoked; but the extent of the contract is not what is claimed. It does not involve any conditions or exemptions beyond those which are clearly expressed or necessarily implied. It is well settled that grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public. It has been said, in respect to grants of special privileges, "that nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown; silence is negative, and doubt is fatal to the claim." *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. The application of this rule will overthrow the contention of the appellant.

As has been seen, the ordinance conferring the grant provided only for the manner of constructing, maintaining, and operating the road. Nothing in the letter or spirit of the ordinance indicates any intention on the part of the city to relinquish municipal regulation and control of the company, if, indeed, it can be done, nor to relieve it from taxation or the ordinary burdens to which other corporations and natural persons within the city are subject. The company must be held to have taken the franchise knowing that the business of operating the road must be conducted under such reasonable rules and regulations as the municipality might impose, and subject to its share of the burdens incident to the conduct of the municipal government. The requirements mentioned in the ordinance do not embrace, and are not in any sense inconsistent with, the one now made, and of which the appellant complains. Express authority is conferred upon cities of the second class to levy and collect a license tax upon the

business of operating a street railroad, (Laws 1881, c. 40, § 3,) and the validity of such legislation has been considered and sustained. *City of Newton v. Atchison*, 31 Kan. 151; S. C. 1 Pac. Rep. 288. We have examined the authorities cited by plaintiff in error, but in them we find nothing in conflict with the conclusion which we have reached.

There has been considerable discussion in regard to whether the imposition of the license tax is an exercise of the police power or of the power of taxation, but this is a matter of indifference in this case, as it is manifest from the contract made that it was not intended by the parties that either should be bargained away or surrendered. We conclude, then, that the conditions stated in the charter providing how and when the road shall be constructed, and the manner in which it shall be maintained and operated, will not exempt the company from reasonable regulation in other respects, or from bearing its share of the public burdens. *San Jose v. San Jose & S. C. R. Co.*, 53 Cal. 475; *Frankford, etc., R. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *City of St. Louis v. Manufacturers' Savings Bank*, 49 Mo. 574; *City of St. Louis v. Missouri R. Co.*, 13 Mo. App. 524; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; S. C. 2 Sup. Ct. Rep. 257; *Union Passenger Ry. Co. v. City of Philadelphia*, 83 Pa. St. 429.

The appellant further contends that he cannot be held criminally responsible for the failure of the company to pay the license tax, claiming that the ordinance did not impose the duty of paying such tax upon any officer, servant, or employe of the company. This contention has no ground upon which to rest. A corporation can only act through its agents, and by the agreed facts it is shown that the appellant is the general manager of the company, and that he was actually engaged in running cars and operating a street railway at the time charged, when the license tax provided by the ordinance was unpaid. The ordinance makes it unlawful for any *person* or firm, as well as a corporation, to engage in any of the occupations or classes of business mentioned without procuring a license and paying the tax; and provides, further, that *whoever* shall engage in such business in violation of such ordinance shall be convicted and punished. It is immaterial whether the appellant was acting for himself or for the company. He was engaged in the business of operating a street railway within the city while the tax was unpaid, and must therefore suffer the penalty.

The judgment of the district court will be affirmed.  
(All the justices concurring.)

(35 Kan. 58)

## MISSOURI PAC. RY. CO. v. JOHNSTON.

Filed March 5, 1886.

## RAILROAD COMPANY—FENCES—KILLING CATTLE.

Where the owner of domestic animals, in a county where the herd law of 1872 was in force, kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, and the animals, without fault of the owner, escaped from the pasture, in the night-time, into a public highway, and wandered upon uninclosed lands through which a railway runs, adjoining the farm of their owner, and are run over and killed by an engine at a place on the railway where it is wholly unfenced, and their escape from the pasture was not and could not, by the use of ordinary care, have been discovered by the owner until after they were killed, *held*, that such animals cannot be said to be "allowed to run at large;" and *further held*, that the railway company, under the stock law of 1874, was liable for the value of the animals so killed.

## Error from Neosho county.

This was an action brought by R. A. Johnston against the Missouri Pacific Railway Company on August 23, 1884, under the railway stock law of 1874, to recover damages for five three-year old steers belonging to the plaintiff, alleged to have been killed June 4, 1884, by the defendant in the operation of its railway. The cause was submitted to the court upon the following agreed statement of facts:

"The defendant is a corporation, duly organized and incorporated under the laws of the state of Missouri. On the fourth day of June, 1884, and long prior to said date, and ever since then, the defendant has been the owner of certain locomotive engines and cars, and has been engaged in operating a railroad through the county of Neosha, in the state of Kansas. On or about the fourth day of June, 1884, the plaintiff was the owner of five three-year old steers, of the value of two hundred and seventy-five dollars, and kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, in said county of Neosho. On the night of said fourth day of June, 1884, said steers, without fault of plaintiff, escaped from said pasture into a public highway, and wandered thence into and upon certain uninclosed lands in said county of Neosho, owned and possessed by one Alva Clark, through which runs defendant's railway, said lands of Alva Clark adjoining the farm of plaintiff, upon which was said pasture.

"Said steers entered upon said railway, in said county of Neosho, from said lands of Alva Clark, and were then and there in the night-time, and upon the same night they escaped from the pasture, run over and killed by the engines and cars of said defendant about two hundred yards from the pasture from which they escaped as aforesaid. The said railroad of defendant in said county of Neosho, at the time and place where said steers entered into the same and were killed, was wholly unfenced, and was not inclosed with any fence whatever to prevent said animals from being on said road. From the time of the escape of said steers from the pasture until they were killed there was no one in charge or pursuit thereof; and their escape from the pasture was not and could not by the use of ordinary care have been discovered by plaintiff until after they were killed. On the eighth day of November, 1872, the board of county commissioners of said county of Neosho, under and by virtue of the powers in them vested by an act entitled "An act providing for the regulation of the running at large of animals," approved February 24, 1872, did direct, by an order then duly made, that on and after the twentieth day of December, 1872, no steer or other animal in said order named should be allowed to run at large within the bounds of said county of

Neosho, which order was entered upon the records of said board of commissioners on the said eighth day of November, 1872, and was published for four successive weeks next after said entry was made in the *Neosho County Journal*, a newspaper then published in said county of Neosho, and has been in full force and effect in said county of Neosho at all times since said twentieth day of December, 1872. On the seventh day of June, 1884, and more than thirty days before the commencement of this action, the plaintiff made demand of H. H. Ludlie, who was then the duly-authorized and acting ticket agent and station agent of said defendant at South Mound, in said county of Neosho, for the value of said steers, but said defendant has ever since failed and refused to pay the same. Fifty dollars is a reasonable attorney's fee for the prosecution of this suit.

"It is hereby agreed that the above-entitled action shall be submitted to the court upon the foregoing agreed statement of facts, the court to be at liberty to draw inferences of fact.

"HUTCHINGS & DENISON, Attys. for Plaintiff.

"DAVID KELSO, Attorney for Defendant."

Judgment was rendered December 8, 1884, in favor of the plaintiff for \$275, with interest from June 4, 1884, and the sum of \$50 was allowed for attorney's fee, together with the costs, taxed at \$10.95. The railway company excepted to the judgment, and brings the case here.

*David Kelso*, for plaintiff in error.

*Hutchings & Denison*, for defendant in error.

HORTON, C. J. In this case it appears from the agreed statement of facts that the plaintiff's cattle escaped from his pasture, and wandered from the public highway upon the uninclosed land of one Alva Clark, through which the defendant's railway runs. The railway was not fenced, and the cattle entered upon it, and were run over by a train. Their escape had not been discovered, and there was no one in pursuit. The herd law of 1872 was in force in the county. It is claimed on the part of the railway company, defendant below, that the plaintiff was bound, at all events, to restrain his cattle; that the killing of the cattle was the result of concurring wrongs, and as the law can neither apportion the damages nor attribute the result to defendant's default, disregarding that of plaintiff, no recovery can be had. *Railway Co. v. Lea*, 20 Kan. 353, and *Shear. & R. Neg.* § 39, are cited. In *Railway Co. v. Lea*, the owner permitted his cow to run at large, in violation of the herd law, and while so running at large the animal strayed upon the track of the railroad and was killed. In this case the owner of the animals kept them confined on his farm in a pasture inclosed with a good and lawful fence, and, without his fault, they escaped in the night-time from the pasture into a public highway, and wandered thence into uninclosed lands upon the defendant's railway, which railway was wholly unfenced. Therefore the case of *Railway Co. v. Lea* is not controlling.

On the other hand, the agreed statement of facts brings the case within the following decisions of this court: *Railway Co. v. Wiggins*, 24 Kan. 588; *Railway Co. v. Bradshaw*, 33 Kan. 533; S. C. 6 Pac.

Reg. 917; *Railway Co. v. Roads*, 33 Kan. 640; S. C. 7 Pac. Rep. 213. In *Railway Co. v. Wiggins* it was held that even in herd-law counties the rigorous doctrine of the common law does not prevail, and that an animal cannot be said "to be allowed to run at large" where the owner has taken reasonable precautions to confine the same. In *Railway Co. v. Bradshaw* it was held that, under the railway stock law of 1874, a railway company is required to inclose its road with a good and lawful fence as against all animals against which such a fence would be a protection; and it was further held in the case that where an unfenced railway passed through a farm, and a hog belonging to the owner of the farm escaped, without fault on the part of the owner, and strayed upon the railway within the limits of the farm, and was there killed by the railway company in the operation of its road, that the railroad company was liable. In *Railway Co. v. Roads* it was said that where hogs escape from a pen in which they are inclosed, by mere accident, no negligence can be properly attributed to the owner therefor; and it was further said that the mere fact that the animals were trespassing upon the land from which they went upon the unfenced railroad track, where they were killed, will not, where the plaintiff is without fault, defeat a recovery. Upon these decisions the judgment of the district court must be affirmed.

(All the justices concurring.)

(35 Kan. 39)

SPALDING and others v. WATSON.

Filed March 5, 1886.

TAXATION—ASSESSMENT—TAX DEED.

A quarter section of land may be divided into 80-acre tracts, and assessed and taxed separately; and this may be done in some cases although the property may belong to one individual; and where a quarter section is so assessed and taxed, it will be presumed, in the absence of anything to the contrary, that the officers did their duty, and a tax deed founded upon such assessment and taxation will be held to be valid, where nothing else appears that would render it invalid.

Error from Wabaunsee county.

*H. H. Harris and Foster & Hayward*, for plaintiffs in error.

*R. A. Friedrich and Irwin Taylor*, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment, brought by George W. Watson against James W. Spalding, F. H. Foster, and F. M. Hayward, to recover the N. W.  $\frac{1}{4}$  of section 33, township 13, range 13, in Wabaunsee county, Kansas. The case was tried before the court, without a jury, and the court made certain special findings of fact and conclusions of law, and rendered judgment in favor of the plaintiff and against the defendants for the recovery of the land, and for costs, and to reverse this judgment the defendants, as plaintiffs in error, now bring the case to this court.

The plaintiff below claims title under the original patent issued by

the United States, on September 10, 1860, to Samuel McClellan, and also under a tax deed issued by the county clerk of Wabaunsee county to C. F. Kenderdine, on September 8, 1882, and recorded on the same day. The defendants claim title under a tax deed executed by the county clerk of Wabaunsee county to B. W. Clark, on July 29, 1870, and recorded on the same day. We shall assume that the tax deed under which the defendants make their claim of title is valid, and that it cuts off all titles existing at the time when it was executed and recorded. The question, then, arises: Is the plaintiff's tax deed valid or not? If it is valid, it will also cut off all prior titles, and give to the plaintiff a perfect title to the land; for the plaintiff's tax deed is the last one executed, and was executed nearly 12 years after the defendant's tax deed. The plaintiff's tax deed is founded upon a tax sale made in the year 1879 for the taxes of 1878, and the principal objection urged against its validity is that the land in dispute was not assessed and taxed in 1878 as one tract, but was assessed and taxed as two 80-acre tracts, to-wit, "the east half" of said quarter section, and "the west half" of said quarter section. Now, why this mode of assessment should render the tax deed void or any of the tax proceedings void we cannot understand. Eighty-acre tracts of land, or half quarter sections, are legal subdivisions, and when government lands are offered for sale at public auction they are always so offered in half quarter sections, (Rev. St. U. S. c. 7, § 2353;) and in Iowa, when the owner of any real estate is unknown, it is always required that each sixteenth part of the section, or other smallest subdivision of land, shall be assessed and taxed separately. McClain, Ann. St. Iowa 1882, tit. 6, c. 1, § 826. And it is generally safer where the names of the owners of lands are unknown, and where separate portions of the lands are susceptible of clear description, to assess them in separate tracts, as they may be owned by different persons; and if they are, and a joint assessment should be made and all the lands taxed together, the owner of one tract could not ascertain the amount of the taxes due on his land or pay the same, nor could he redeem his land from the taxes when sold without paying all the taxes imposed upon all the other lands assessed and taxed with his. *Shimmin v. Inman*, 26 Me. 228, 233. See, also, *Shaw v. Kirkwood*, 24 Kan. 476; *Kregelo v. Flint*, 25 Kan. 695. At the time when the assessment was made in the present case, and now, the act relating to taxation provided, among other things, as follows:

"Sec. 44. Each assessor shall make out, from such sources of information as shall be within his reach, a correct and pertinent description of each piece, parcel, or lot of real property, in numerical order as to lots and blocks, sections or subdivisions, in his township or city, as the case may be, and he may require the owner or occupant of such property to furnish such description." Comp. Laws 1879, c. 107, § 44.

In the absence of anything to the contrary, it will be presumed that the assessor did his duty. Indeed, in the absence of anything

to the contrary, it will always be presumed that all officers do their duty. We might further say that the land in controversy was vacant and unoccupied from the beginning up to March 1, 1883; that the patent for such land was not recorded in the county until some time in the year 1883; and that the land was continuously assessed and taxed in separate 80-acre tracts from the year 1864 up to the present time,—from 1864 up to 1870 as “unknown,” and from that time up to 1878 in the name of B. W. Clark, the grantor of the defendants; and, presumably, it was so assessed and taxed from the year 1870 up to 1878 with the approval of Clark, and, presumably, he paid the taxes as thus imposed up to and including the year 1877; and, if so, why should his subsequent grantees, the present defendants, now complain? It is also provided in the act relating to taxation as follows:

“Sec. 139. No irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceedings, or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned to him or them, upon the day specified, work an invalidation of any such proceedings or of said deed.” Comp. Laws 1879, c. 107, § 139.

We have examined the authorities cited by counsel for the defendants, (plaintiffs in error,) and do not think that they are applicable under the facts of this case and the statutes of this state. We think the tax deed under which the plaintiff claims title is valid. There are some other objections urged against the validity of this tax deed, but we do not think that they are at all tenable.

The judgment of the court below will be affirmed.

(All the justices concurring.)

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(35 Kan. 43)

CLARK and another, Adm'x, etc., v. PHELPS.

Filed March 5, 1886.

1. WITNESS—CROSS-EXAMINATION.

While it is proper for a court to permit a party, on cross-examining the witness of the adverse party, to put questions to the witness, the answers to which may tend to show bias or prejudice towards the party conducting the cross-examination, yet where many such questions have been asked and answered, and the exact relations and feelings existing between the witness and the party conducting the cross-examination have been shown, the court may not commit material error in refusing to permit further questions for the same purpose to be asked; and *held*, in the present case, that no material error was committed in this respect.

2. TRIAL—ERRORS.

Other matters considered, and *held*, that the court did not commit material error with reference thereto.

3. WITNESS—IMPEACHMENT.

The plaintiff introduced evidence for the purpose of impeaching the testimony of one of the witnesses for the defendant, and in doing so introduced some evidence that could not have been introduced in any other manner,

and might have been left out of the case entirely; but *held*, under the circumstances of the case, that the court did not commit material and reversible error.

Error from Leavenworth county.

*Stillings & Stillings*, for plaintiffs in error.

*Lucien Baker*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Leavenworth county by Frank A. Phelps against B. C. Clark & Co. to recover the sum of \$1,344.07, for services and money advanced. The case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff, and against the defendants, for \$507.50, and the present plaintiffs in error, as successors to the original defendants below, now bring the case to this court for review.

The first assignment of error is that the court below refused to permit the defendants below to ask the plaintiff's witness, C. L. Knapp, on cross-examination, the following question: "Didn't you try to get away their [the defendants'] salesmen, so as to leave their [the defendants'] house without salesmen?" This question was not asked for the purpose of obtaining any evidence concerning the merits of the controversy, and it was wholly irrelevant to the merits; but it was asked for the purpose of eliciting evidence tending to show that the witness Knapp was prejudiced against the defendants. The court might very properly have permitted the question to be asked and answered, (*State v. Krum*, 32 Kan. 373; S. C. 4 Pac. Rep. 621;) but, under the circumstances of this case, we do not think that any material error was committed by the refusal. Many other questions were asked and answered tending to show the exact relations existing between the witness and the defendants, and his feelings towards them, and hence the refusal to permit this question to be asked or answered was of but very little consequence, and not material error. Besides, courts seldom enter into the small details of transactions, or into the minute investigation of collateral facts, merely for the purpose of ascertaining any bias or prejudice that might possibly exist on the part of the witnesses of the adverse party. Such a course would have a tendency to render the trial of cases interminable.

The next assignment of error is that the court below erred in refusing to permit the same witness, upon cross-examination, to answer the following question propounded by the defendants, to-wit: "State how the fact is,—whether the position of book-keeper in the wholesale department is not one of the most responsible positions there can be in a house?" This question has nothing to do with the merits of the case, nor could the answer to the question have affected the merits; and we cannot see that the court committed any material error in refusing to permit the question to be answered, although the court, under the circumstances, might very properly have done so, as it had already been shown what the book-keeper received as compensation, and as the object of the question was to show that the position of

book-keeper was a more responsible position than that of the plaintiff, Phelps.

The next claim of error is that the court below asked a certain witness many questions, and, after the answers were given, then remarked: "It is only a basis; that is all I want to get." It is admitted that it would not have been error for the court to have permitted the counsel for the plaintiff to ask the questions, and we cannot say that the court below committed any material error in asking them itself, or in making the remark it did.

The next ruling of the court below complained of is in permitting the plaintiff's witness in rebuttal, James J. Daniels, to detail a conversation had between him and one of the defendants' witnesses, Charles Thompson, who had previously testified in the case, showing what Thompson had said in such conversation that B. C. Clark, who had been the principal plaintiff in this case, but who was then deceased, had said in his life-time. We cannot say that the court below committed material error in this. The testimony of Thompson concerning this conversation between him and Daniels had previously been given, and Thompson had testified that this conversation was the only one which they had had upon the subject, and that this conversation was had in a car while they were going from Leavenworth to Kansas City. Thompson was asked by the plaintiff, on cross-examination, the following, among many other questions: "Did you say to Mr. Daniels, in any conversation, that you had told B. C. Clark that he was in the wrong, and that Frank would beat him in any case?" Thompson answered: "No, sir; I never did." Thompson also testified, in substance, in answer to other questions by the plaintiff, that he had always stated substantially the reverse of this. The only thing which Daniels testified that Thompson said that B. C. Clark said was as follows: "B. C. Clark told him that there would probably be a lawsuit, but he should fight it to the end;" and Daniels further testified that Thompson said that his (Thompson's) reply to this remark of Clark was: "If he went into court with the case there was, Frank was sure to beat him." Some of the testimony of Daniels could not have been introduced for any purpose except for the purpose of impeaching some of the testimony of Thompson, and some of it was not proper in the case at all; but, under all the circumstances of the case, we cannot say that the court below committed any such material error in permitting such testimony to go to the jury as will require a reversal of the judgment below.

We do not think that the charge of the court was erroneous or misleading.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 27)

## WARNER v. THOMPSON.

Filed March 5, 1886.

## 1. CONTRACT—WRITTEN CONTRACT CONSTRUED BY COURT.

Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court.

## 2. SALE—DELIVERY—PROPERTY IN POSSESSION OF ANOTHER.

Where the agent of W. accepts an order from T. to sell to T. a safe in the possession and under the control of L., and the order provides that L. shall deliver the same to T., and the order is subject to the approval of W., and W. afterwards approves the same, and directs L. to deliver to T. the safe, but L. refuses absolutely to do so, *held*, that T. is not responsible for the refusal or wrong of L., and W. is liable to T. for the damages of the breach of the contract on his part.

Error from McPherson county.

On May 26, 1885, the following order or agreement was signed:

"H. H. Warner: Please consign one Mosler O. Bahman fire-proof safe, size inside, 22 inches high, 17 inches wide, 12 inches deep, to M. A. Thompson, town of McPherson, county of McPherson, state of Kansas. The undersigned is to take possession of safe taken in exchange from Loomis Bros. on arrival of their new safe, and agrees to pay \$30 for the same, fifteen dollars on delivery or consignment of safe, with interest at 8 per cent. for balance, which is due in three months. Undersigned takes above safe where it stands. This order subject to approval by H. H. Warner. In case of deferred payment, notes to be forwarded to you at the expiration of 25 days from date of invoice, or the amount shall become due at the expiration of 30 days from the date of bill, and I agree to accept and pay draft of amount mentioned above, and not to countermand the same. It is agreed that the title to said safe shall not pass until notes are paid, or safe paid for in cash, but shall remain your property until that time. In default of payment you or your agent may take possession of and remove said safe without legal process, and I hereby waive all claims of damage arising from such removal. It is hereby also expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims of verbal agreements of any nature not embodied in this order.

"Truly yours,

M. A. THOMPSON.

"Net price \$30. Short delay."

Subsequently M. A. Thompson brought his action against H. H. Warner for a breach of contract, alleging that a new safe arrived at McPherson, in this state, for Loomis Bros., on July 25, 1883, and thereupon he made demand of said Loomis Bros. for the possession of the second-hand safe mentioned in said order or agreement, but the same was refused to him, the said Loomis Bros. declaring they would neither accept the new safe nor let the old one go. The defendant filed an answer, which contained, among other things, a general denial, and set forth said order or agreement between the parties; but also alleged that the condition precedent to the taking effect of said order was that the defendant should approve the same, and that the defendant had never approved it, and had always refused so to do. The defendant, for a third defense, set forth "that the words in said order, to-wit, 'the undersigned is to take possession of safe taken in exchange from Loomis Bros., on arrival of their new safe,' mean 'on

arrival and acceptance by Loomis Bros. of their new safe; that this was a condition precedent to the taking effect of the contract between the parties to this suit; that Loomis Bros. never did accept their new safe, and defendant denies that he agreed to sell or deliver to plaintiff said safe until Loomis Bros. accepted their said new safe." To this third defense the plaintiff demurred, which demurrer, after argument and consideration by the court, was sustained. To the other portions of the answer the plaintiff filed a reply, alleging that the defendant ratified the order and agreement set forth in his answer. Trial had at the October term of court for 1884, to the court without a jury. The court, at the request of the defendant, made the following findings of fact:

"(1) That the contract set up in defendant's bill of particulars was made and entered into by the plaintiff and defendant. (2) That the defendant ratified or approved the sale of the safe therein made by his agent. (3) That both plaintiff and defendant well knew at time of contract that the old safe had not come to the possession of defendant, and that he only had then an equitable title or interest in it, or a contract of trade for it. (4) That both parties supposed in good faith, at time of contract, that said safe would come fully to the ownership and possession of defendant. (5) Said safe did not come to the ownership or possession of said defendant, the Loomis Bros. named refusing to accept the new safe, and therefore refusing to give up the old. (6) Said new safe came for Loomis Bros. in a reasonable time, and thereupon plaintiff demanded and offered to take the old safe as per his agreement. (7) Said plaintiff has at all times been ready and willing to comply with all the conditions of the contract upon his part, and the defendant the same, only that he could not because Loomis Bros. would not give up the safe. (8) The reasonable value of the safe in question was \$65."

And thereon made the following conclusion of law: "That plaintiff is entitled to recover for breach of the contract the sum of thirty-five dollars."

Judgment was entered accordingly for the plaintiff against the defendant for \$35, his damages so found, together with all costs. The defendant excepted to all the findings and the judgment, and brings the case here.

*Frank G. White*, for plaintiff in error.

*M. A. Thompson*, for defendant in error.

HORTON, C. J. It is alleged that the court erred in sustaining the demurrer filed by plaintiff below to the third defense set up in the answer of defendant. We think not. The order or contract provided that the defendant was to take possession of the old safe accepted in exchange, from Loomis Bros. on the arrival of the new safe. The third defense interpolated in the contract, after the word "arrive," "and acceptance." The defendant cannot be permitted to give his own construction to the contract by adding other words. The interpretation or construction of a writing, unambiguous in its terms, is a matter of law for the court to pass upon.

It is next alleged that the district court erred in sustaining the exceptions filed by plaintiff below to a deposition in behalf of defend-

ant. The deposition was that of Hiram Stockbridge, the general manager of the business of the defendant. It showed, among other things, that on May 31, 1883, the defendant received at his office at Rochester, New York, an order for a safe from Loomis Bros., McPherson, in this state, and at the same time the order from plaintiff below for the old safe to be taken in exchange from Loomis Bros.; that the defendant sent printed notices to Loomis Bros. and plaintiff below, and that the defendant acknowledged receipt of the orders; that on June 21, 1883, the safe ordered by Loomis Bros. was shipped them by the defendant in exact accordance with their agreement of June 11th, and that the defendant sent to plaintiff below a bill for the old safe on the terms of his order, and also an order on Loomis Bros. for its delivery to him; that Loomis Bros. refused to take the new safe from the depot, or to deliver the old safe to the plaintiff, although the defendant made repeated efforts to induce them to do so. The part of the deposition that the court ruled out was as follows: "The order of said Thompson was contingent upon his taking possession of the safe as stipulated in his order, and has never been approved or accepted by the said H. H. Warner upon any other consideration; that said H. H. Warner never agreed to deliver possession of the safe to Thompson." And also, "Believing Loomis Bros. to have received their new safe, said Warner sent Thompson a bill for the old safe." We perceive no material error in the rejection of this testimony. The contract is in writing, and speaks for itself, and all the testimony attempting to vary or contradict the written order or agreement was incompetent. The defendant was to deliver to Loomis Bros. a new safe, and was to cause Loomis Bros. to deliver the old one to the plaintiff, and the defendant was responsible for any failure on the part of Loomis Bros. to deliver the old safe to plaintiff, whatever may have been the cause of such failure. *Thompson v. Warner*, 31 Kan. 533; S. C. 3 Pac. Rep. 339. If Loomis Bros. were guilty of a breach of the contract with the defendant, plaintiff below was not responsible; and if the defendant has suffered damages on account of the action of Loomis Bros., plaintiff ought not also to suffer. The defendant was evidently bound to see that the old safe was delivered to plaintiff. If he failed so to do, he was liable for a breach of his contract, as it clearly appears from the evidence in the case that he approved the order or agreement signed by the plaintiff, and dated May 26, 1883.

After an examination of the record, we find that there was sufficient evidence to sustain the findings and judgment of the trial court; therefore the judgment must be affirmed.

(All the justices concurring.)

## SUPREME COURT OF CALIFORNIA.

(68 Cal. 635)

*Ex parte* LE PROTTI. (No. 20,125.)

Filed February 26, 1886.

## MUNICIPAL CORPORATIONS—UNIFORMITY OF LICENSES.

A municipal corporation having by its charter power to license occupations, and that "licenses shall be discriminating and proportionate to the amount of business done." may, in pursuance of such power, provide that laundries shall be licensed according to the number of persons employed in them, this being one way of ascertaining how much business is done. THORNTON, J., dissents.

In bank. Application for discharge on writ of *habeas corpus*.

*Jas. A. Johnson*, for petitioner.

*C. T. Johns*, for respondent.

Ross, J. The sole point presented by the petitioner is that he is illegally restrained of his liberty because he is held for a violation of a certain ordinance of the city of Oakland, which, it is claimed, violates that provision of the charter of the city which declares that "licenses shall be discriminating and proportionate to the amount of business." St. 1862, p. 353. The portion of the ordinance which it is claimed violates this provision of the charter is section 14 of an ordinance entitled "An ordinance establishing and regulating municipal licenses," and which reads as follows:

"For owners or keepers of laundries who employ or use two or less than four persons in transacting the business of said laundry, \$7 per quarter; for those who employ not less than four and less than eight persons, \$12 per quarter; for those who employ not less than eight and less than twenty persons, \$20 per quarter; for those who employ twenty or more persons, \$40 per quarter."

As has been seen, licenses by the charter are required to be made proportionate to the amount of business done. Whether the number of persons employed in the various laundries of the city is the basis by which can best be gauged the amount of business done therein or not, it is *one* way of doing so, and, for aught we know, the safest way. The city council cannot count the various articles of wearing apparel laundried by the various laundries; but it is fair to presume that no more persons are employed in such establishments than are necessary to the performance of the work, and, as a consequence, that the amount of business done by such establishments is in proportion to the number of persons employed therein. The nature of the business in question is quite different from that of a merchant who, with one employe or none at all, may do more business than other merchants with a hundred employes. We think there is no analogy between the two cases, and that it was permissible for the council to take a practical view of the question, and legislate accordingly.

Writ dismissed, and prisoner remanded.

v.10p.no.2—8

We concur: MYRICK, J.; SHARPSTEIN, J.; MORRISON, C. J.

THORNTON, J. I dissent. I do not think the ordinance accords with the charter. How does the employment of a certain number of men indicate the amount of business done by a laundryman? It might be that a man who employs eight men does less business than one who employs four men. The custom of the latter may be greater than that of the former. If a merchant employs eight clerks it does not follow that he does a greater amount of business than one who employs four. Again, it is not said in the ordinance when and for how long the persons referred to must be employed. Must they be employed at the date the license is issued or during the period granted? How if four of the eight are dismissed the day after the license is granted, or four employed during the previous quarter and eight when the license is granted? How, then, can such a test furnish a means of estimating the amount of business? In my view it may furnish modes of conjecture or guess, but nothing more. There is a means of determining the amount of business. That is by the receipts in money for the previous quarter. Surely there must be some mode of determining this. If the ordinance supplies no mode, it should be amended in that regard. Surely a municipal corporation like the city of Oakland, whose powers are derived from its charter, and which do not go beyond the grant in the charter, fairly and reasonably construed, cannot adopt such a conjectural mode as the one above stated for determining the amount of business done by a laundryman, in proportion to which amount the license to be paid is to be fixed. A construction which allows a mode so uncertain in its data, so incompetent to determine the amount of business done, the city should have no power to adopt. The powers of such a corporation are limited by its charter, the meaning of which must be arrived at by a reasonable construction, and, when there is any ambiguity, the ambiguous language must be resolved against the city.

In my judgment the prisoner is illegally held, and should be discharged.

#### KETCHUM v. COUNTY OF PLUMAS. (No. 11,006.)

Filed February 25, 1886.

1. COUNTIES—CLAIM AGAINST COUNTY—AFFIDAVIT OF CLAIMANT.

If the affidavit attached to a claim to be presented to the board of supervisors of a county is substantially as required by law, it will be sufficient.

2. SAME—JUDGMENT REVERSED.

On authority of *Whiting v. Plumas Co.*, 64 Cal. 65, judgment reversed.

In bank. Appeal from superior court, county of Plumas.

*Goodwin & Jenks*, for appellant.

*R. H. F. Variel*, for respondent.

By THE COURT. Action to recover moneys received by plaintiff as county recorder, and paid to the treasurer of the county. The affi-

davits of the claimant, attached to the claim presented to the board of supervisors, were in substance as required by law, and are sufficient. The facts as found are sufficient to present the case as it really exists. On the authority of *Whiting v. Plumas Co.*, 64 Cal. 65, the judgment and order are reversed, and the cause is remanded with instructions to the court below to render judgment in favor of plaintiff for the sum of \$2,209.92 and costs.

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(68 Cal. 569)

BARNES v. MARSHALL. (No. 9,001.)

Filed February 25, 1886.

WATERS AND WATER-COURSES—RIPARIAN OWNER—RIGHT TO PREVENT CHANGE IN CHANNEL OF STREAM.

A riparian owner may protect his land from a threatened change in the channel of the stream liable to occur by reason of the washing away of his bank, and in pursuance thereof may build a bulk-head as high as was his original bank before it was washed away. And this will not deprive the opposite owner of any right, nor give him legal ground for complaint.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

*Henley & Oates*, for appellant.

*Rutledge & McConnell*, for respondent.

FOOTE, C. An action for the removal of a nuisance, and for a perpetual injunction against the erecting or maintaining thereof. The defendant had judgment in his favor, and for costs, and the plaintiff appeals upon the judgment roll alone. All the issues raised by the pleadings were passed upon by the findings, although in some respects the latter might have been expressed with more perspicuity. By them it becomes apparent that the plaintiff and defendant own separate parcels of land, lying opposite to each other, on the banks of the Russian river, in Sonoma county, the river being the common boundary between the two. For some years prior to 1879 the river had been washing off portions of its bank lying upon the defendant's land. At a certain point on said land the stream having, as it were, slowly eaten into and carried off a portion of its bank on defendant's front, was threatening to cut a new channel through his land, which would have eventuated in the carrying off of some acres thereof. To prevent this the defendant built a bulk-head on his own land, which was carried away, in the main, by a flood. He then, in October, 1880, constructed another slightly nearer the river, and again this was partially destroyed by the floods of the succeeding winter; and in the washing out caused thereby quite a pool of water was formed in and upon the defendant's land, almost as deep as the bottom of the river, which at low stages thereof remains full of still water. Upon the subsidence of the floods, the river returned to its former channel, a pool of water remaining at the place where the bank and the spiling of the bulk-head had been washed away. In October, 1881, the defendant again built a bulk-head of the same character as the one pre-

vously erected, commencing it with the upper end of the part of the old one still remaining, and running it in such a way as to carry it through the pond above mentioned, and some 15 or 20 feet back of the former bulk-head, and continued by running it through an excavation of his high bank. The last bulk-head is not quite so high as the former, and is somewhat lower than his original bank, (now washed off,) as it stood in 1879.

The plaintiff's bank does not appear to have been lowered in any way, and a sand-bank on his side has risen higher than the bulk-head on the defendant's side. At high water the defendant's bulk-head does not prevent the water from overflowing it, and has no more injurious effect on the plaintiff's land than had the bank of the river as it stood in 1880; and the land of defendant, notwithstanding the bulk-head, is overflowed at high water, as it was before its construction. By removing the bulk-head the stream would probably cut a channel through defendant's land, and thereby, perhaps, relieve the plaintiff of apprehended danger. He, however, had suffered no damage up to the institution of this action. It therefore appears that the contention of plaintiff is that the defendant cannot reconstruct his bank, washed off by the river, to such a height as the bank formerly stood, and thereby prevent the river from running through his land; which last, if permitted, would, by shortening the stream, take the water off of plaintiff's bank, and render his land less liable to overflow. And he claims that the river must be permitted, without obstruction, to change its current, even if thereby it cut a new channel through and over the defendant's land.

This position is not tenable. The defendant had a right to protect his land from the threatened change of the river's channel by building a bulk-head as high as was his original bank before it washed off. He thereby took no right from the plaintiff,—he simply attempted to maintain his own. Ang. Water-courses, § 333. "A riparian proprietor may in fact legally erect any work to prevent his lands from being overflowed by any change in the natural state of the river, and to prevent the old course of the river from being altered." *Farquharson v. Farquharson*, 3 Bligh, Pr. (N. S.) 421, 422. According to the findings, the pond left from the high water on defendant's land was not a channel of the river, but only threatened to become so, which the defendant was seeking to prevent; and this he had a right to do, if he did not thereby interfere with the ancient channel of the stream. Ang. Water-courses, § 108.

There is no error in the record, and the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLES, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(68 Cal. 572)

## PFISTER v. DASCEY and others. (No. 8,871.)

Filed February 25, 1886

## 1. HOMESTEAD—RESIDENCE ON PREMISES.

To constitute a valid homestead under the California law existing in 1899, as well as under the present existing law, claimant must actually reside on the premises at the time of filing the declaration

## 2. SAME—RESIDENCE, EVIDENCE OF.

Residence of a person at a particular time is a fact to be determined by testimony, in the same manner provided for the establishment of other facts; and not being a fact of general interest, cannot be proved by evidence of common report.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

*J. J. Burt*, for appellant.

*Laine & Johnston*, for respondent.

SEARLS, C. This is an action of ejectment to recover some 45 acres of land in Santa Clara county. Defendants had judgment, from which, and from an order refusing a new trial, plaintiff appeals. Plaintiff's title is based upon a constable's deed of the premises, executed pursuant to a sale under execution levied thereon February 19, 1879. Defendants (husband and wife) claim that the premises at the date of levy of the execution were, and ever since have been, their homestead, by virtue of a declaration of homestead executed, acknowledged, and duly filed for record on the tenth day of April, 1869. The statute in force when defendant's declaration of homestead was filed, like the present Civil Code, required that the person making the declaration should reside upon the premises at the date of making and filing such declaration. To constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed. *Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, Id. 630; *Prescott v. Prescott*, 45 Cal. 58; *Gregg v. Bostwick*, 33 Cal. 220.

The finding of the court is that "on the tenth day of April, 1869, and while said John Dascey and his family were occupying said premises described in the complaint, and residing thereon with the intention of making said residence their permanent home, said John made, executed, acknowledged, and filed for record, in the recorder's office in and for Santa Clara county, his declaration of homestead upon the premises described in the complaint, which said declaration was in the due and usual form provided by law," etc. There was testimony sufficient, if credited, to warrant the findings; and being conflicting, we are not, under the well-established rules of this court, authorized to interfere with the result reached by the court below.

2. At the trial plaintiff introduced evidence showing that an indictment was found against John Dascey, the defendant, in the county of Santa Clara, on the twenty-eighth day of May, 1869, charging him with the commission of a crime in that county on the

third of May, 1869. Plaintiff then offered to prove by several witnesses that at the time of defendant's arrest on said charge "it was generally reported and understood among them at that time, and on April 10, 1869, that he [defendant] and his family were not living in Santa Clara county, but were living in San Francisco." To the introduction of this testimony defendants objected "upon the ground that it was immaterial, irrelevant, and incompetent." The objection was sustained by the court, and the ruling is assigned as error.

By subdivision 11 of section 1870 of the Code of Civil Procedure evidence may be given of "common reputation existing previous to the controversy respecting facts of a public or general interest more than 30 years old, and in cases of pedigree and boundary." The residence of defendant in 1869 was a fact to be determined by testimony as other facts are required to be established. It was not a fact of any general or public interest, and not a fact to be proven by the general understanding and report. Hearsay evidence is not, as a rule, competent to establish any *specific fact* which in its nature is susceptible of being proven by witnesses who can speak from their own knowledge. 1 Greenl. Ev. § 99. There is a class of cases in which the very fact in controversy is whether certain things were said or done, and not whether they were true or false; in which cases the words or acts are admissible, not as hearsay, but as original, evidence. The testimony proffered did not come under this last or any other head with which we are familiar entitling it to be introduced, and it was properly excluded. There were no errors of law committed at the trial prejudicial to the plaintiff, and we are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELOHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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GURNEN v. GARRITY. (No. 11,453.)

Filed February 25, 1886.

APPEAL.—MOTION TO DISMISS APPEAL DENIED.

In bank. Motion to dismiss appeal.

E. F. Fitzpatrick, for the motion.

J. B. Hart, contra.

BY THE COURT. Motion to dismiss appeal on clerk's certificate. No service of notice of appeal was made on adverse party. See *Frederick v. Tierney*, 54 Cal. 583. Motion denied.

(68 Cal. 604)

KIRBY and others v. SUPERIOR COURT OF NEVADA Co. and others.  
(No. 9,869.)

Filed February 25, 1886.

## 1. PLEADINGS—DEMURRER—AMENDMENT AFTER FINAL JUDGMENT.

Where a complaint is demurred to, and the demurrer sustained, and on plaintiff's refusal to amend judgment is entered for defendant, and on appeal such judgment is affirmed, the superior court cannot, on plaintiff's motion, then allow him to amend his complaint, and thereupon proceed with the trial of the cause; and such threatened action may be prevented by writ of prohibition, notwithstanding the fact that the order allowing the amendment is appealable, as the remedy by appeal, though adequate, would not be speedy.

## 2. SAME—AMENDMENT PENDING APPEAL.

During the pendency of an appeal, a trial court has no jurisdiction to order or allow an amendment to any pleading.

In bank. Application for writ of prohibition.

*Lloyd & Wood*, for petitioners.

THORNTON, J. Application for a writ of prohibition. In the action *Johnson and others v. Kirby and others*, in the superior court of Nevada county, the plaintiffs filed an amended complaint, to which defendants demurred. The demurrer was sustained, and plaintiffs herein refused to answer. Thereupon judgment was entered for the defendants. From this judgment plaintiffs appealed to this court, where the judgment was affirmed. *Johnson v. Kirby*, 65 Cal. 482; S. C. 4 Pac. Rep. 458. After the affirmance of the judgment, and more than one year after the entry of the final judgment, the superior court above named, on motion of plaintiff Johnson, made an order vacating the judgment and allowing plaintiffs to file another amended complaint, and now threatens to proceed to try said cause notwithstanding the final judgment affirmed as aforesaid. To prevent this a writ of prohibition is asked for.

We are of opinion the writ should be allowed. The plaintiffs had an opportunity to amend prior to the appeal. This they declined to do, preferring to stand on the complaint as they had shaped it and resort to the remedy of appeal from the judgment. This they tried, and the appeal was determined against them. It would be the height of injustice now to allow the plaintiffs, after trying the remedy by appeal, and having been cast on it, to do that which they had refused to do when it was submitted to their option. The judgment which they appealed from having been affirmed, there is an end of the litigation. The defendants having gained the suit in the course adopted by plaintiffs, the plaintiffs should not be allowed to turn round and say, they should be allowed to try the course which they refused to adopt when it was in their power to adopt it. Such inconsistent action is likened to *blowing hot and cold* with the same breath, which a court of justice always discountenances and disallows. Broom, Leg. Max. *allegans contraria*, etc., \*169.

It is said the order allowing the amendment is an appealable order. Conceding it is, we do not think the defendants should be put

to the delay and expense of an appeal. This remedy, while it would be adequate, would not be *speedy*. *Merced M. Co. v. Fremont*, 7 Cal. 130. The plaintiffs, under the state of facts above presented, should not be put to the delay of an appeal. The cause is a plain one, and we are convinced the court has no power or discretion after final judgment affirmed to vacate the judgment and allow an amendment to a complaint under the circumstances presented here. The judgment of this court on appeal has determined that there was no error in the record, and the parties and court *a qua* are alike concluded by it from vacating it and making another case for trial. The plaintiffs should not be thus allowed to speculate or gamble on remedies.

There is here a final judgment, and certainly the court could not allow an amendment to a complaint when more than a year had elapsed since the final judgment was rendered and entered. Under such circumstances an amendment is only allowed for clerical misprisions, when the means for making the amendment and the right to make it are furnished by the record itself of the case. *De Castro v. Richardson*, 25 Cal. 49; *Estate of Schroeder*, 46 Cal. 316. In other regards the court has no power to alter the record in any respect. It has then passed beyond the power of the court, or there could not be an end of the litigation.

There is no answer to the petition, therefore we have taken the facts as stated in the petition as admitted; and on these we are of opinion the writ should issue. It would be a hard case on defendants that a court should allow the affirmed judgment in an action to be vacated, and a new case made by plaintiffs, after defendants, on the elected showing of plaintiffs, had won the suit. An amendment of the complaint would not then be in furtherance of justice, and amendments are only allowed in furtherance of justice. Code Civil Proc. § 473.

It does not appear from the petition that a *remittitur* was ever sent down from this court to the court below on the affirmation of the judgment. But this does not help the case of the respondents. While the appeal is pending the court below certainly could not have jurisdiction to order an amendment to any pleading.

The writ must be allowed. So ordered.

We concur: ROSS, J.; SHARPSTEIN, J.

I concur in the judgment: MYRICK, J.

(2 Cal. Unrep. 647)

## ROSS v. BRUSIE. (No. 9,965.)

Filed February 26, 1886.

## MORTGAGE—DEED ABSOLUTE AS MORTGAGE—EVIDENCE—BOOK ACCOUNTS.

In proceedings for redemption from a mortgage, where the question at issue is whether a deed absolute in form with an agreement for reconveyance was intended as a mortgage or not, a book of account cannot be introduced in evidence to show that defendant credited plaintiff with the alleged purchase price of the lot in controversy.

Commissioners' decision.

In bank. Appeal from superior court, county of Stanislaus.

*L. J. Maddux and Wright & Hazen*, for appellant.

*W. E. Turner*, for respondent.

SEARLS, C. This is an action to redeem a lot of land in the town of Modesto. A deed, absolute in form and purporting to be in consideration of \$250, was executed and delivered by plaintiff to the defendant. The latter at the same time delivered to the former a bond, by which he bound himself to convey to the former, at any time within two years, the same property upon the payment to him of \$250. Plaintiff failed within the two years to tender the sum mentioned in the bond, but subsequently did make such tender, and demanded a deed from defendant, which was refused. The question for determination in the court below was whether the transactions, taken together, constituted a mortgage. It was held that they did not. The finding is that the deed was not given as security, but was executed and delivered by plaintiff to defendant in pursuance of a sale of the property in question. There is testimony in support of the facts as found by the court, and the conclusions of law and judgment are in consonance with the facts. At the trial, defendant was permitted to introduce in evidence, against the objection of plaintiff, his book of account for the purpose of showing that he credited plaintiff with \$250, the alleged purchase price of the lot of land concerning which the controversy arose. The entries made by a party in his books of account are admissible in his own favor under certain limitations and for certain specific purposes. 1 Greenl. Ev. § 118. This, however, is an exception to a general rule which holds that a party cannot make evidence in his own favor. The proffered evidence was not properly within any exception to be found in the reported cases, and should have been excluded. For this error the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

GROSS v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and others. (No. 11,437.)

Filed March 9, 1886.

CERTIORARI—APPLICATION FOR CERTIORARI GRANTED.

Department 2. Application for writ of *certiorari*.

*J. M. Huster*, for petition.

BY THE COURT. In this cause it is ordered that a writ of review issue as prayed for, and that all proceedings in the cause of *Gross v. Cleland*, in the superior court above named, be staid until further order. On the hearing the question of the constitutionality of the provision in section 980, Code Civil Proc., authorizing the superior court to grant a change of the place of trial in cases appealed from justices' courts will be argued by counsel.

(68 Cal. 607)

BISHOP v. FULKERTH. (No. 8,794.)

Filed February 25, 1886.

WAREHOUSE RECEIPTS—NEGOTIABILITY OF—PASSING TITLE BY INDORSEMENT.

A warehouse receipt is negotiable unless marked non-negotiable, under the California Act of 1858, and an indorsement and delivery thereof by the party for whose account it was issued passes the absolute title to the property mentioned in it to the transferee, without any attornment of the warehouseman to the holder; and the legislature has power to make such receipts negotiable. THORNTON, J., dissents.

Commissioners' decision.

In bank. Appeal from superior court, county of Stanislaus.

*Wright & Hazen*, for appellant.

*Schell & Bond*, for respondent.

FOOTE, C. Action of claim and delivery. The defendant appeals from that part of the judgment awarding 10 bags of wool to the plaintiff. The latter appeals from that part which adjudges 20 bags of wool to the defendant. The case comes here on the judgment roll alone, there being no motion for a new trial. The defendant contends that upon the findings he should have had judgment for the 30 bags of wool; the plaintiff that judgment for him should have been had in like manner for the same amount. This state of facts appears by the record. The bank of Sonoma on the twenty-first day of April, 1882, instituted an action against one Linville upon two promissory notes. Upon the next day an attachment was issued ancillary to that action, and a seizure was made by the sheriff of Stanislaus county, the defendant in this case, of 30 bags of wool, then in a warehouse, where it had been left on storage by Linville. One warehouse receipt issued was as follows:

"THE FARMERS' WAREHOUSE COMPANY OF OAKDALE, STANISLAUS COUNTY, CAL.

"No. 5.

OAKDALE, CAL., April 22, 1882.

"Received on storage from J. A. Linville, for account of self, in good order, in the Farmers' Warehouse Company's warehouse, at Oakdale, Stanislaus

county, Cal., 10 bags of wool, weighing 2,961 pounds, pile No. —, —pounds, marked 'O,' which we agree to deliver in like order, (dangers from fire or sweating excepted,) on return of this receipt properly indorsed and payment of storage, as follows: Storage, fifteen cents per bale, first month; after that five cents per month additional. Number of bags ten. Number of pounds, 2,961.  
A. S. EMERY, Superintendent."

The other receipt was in the same words and figures, except that it was numbered "4" and called for "20 bags of wool" "weighing 5,326 pounds, marked J. A. L." At the time of the issuance of these receipts the wool was accredited to Linville's account, on said company's books, and no further entry thereof was made before the attachment herein was levied, and until after the warehouse receipts were surrendered by the plaintiff in this action. Receipt "No. 4," about three hours and a half before the levy of the attachment, was indorsed as follows: "Deliver to F. Weyer. J. A. LINVILLE;" and immediately delivered to Weyer. At the same time receipt No. 5 was indorsed in the same language to S. Bishop, to whom, also, immediate delivery of it was made. Bishop at that time notified Mr. Martin, its secretary, and person in charge of the company's warehouse, of the indorsement and delivery of receipt No. 5 to him, and showed the receipt so indorsed, but no other notice concerning the delivery or indorsement of that, or receipt No. 4, was ever given the company, and no change made in the marking or situation of the wool mentioned in the receipt, or upon the books of the company, until after the attachment was levied and until the surrender of said receipts to said company. Weyer retained his receipt until the sixteenth of May, 1882, when, for a valuable consideration, he indorsed it as follows:

"OAKDALE, CAL., May 16, '82.

"For value received, I hereby assign, transfer, and deliver to S. Bishop the within receipt, and the wool represented thereby, and all rights thereto;"

and then and there delivered it to Bishop. Bishop retained both the receipts until long after the commencement of this action, when he surrendered them to the said company, and took said wool, and J. A. Linville's account was by them debited therewith. All the wool was seized under the attachment by the defendant at about half past 6 o'clock P. M. on the twenty-second day of April, 1882, as Linville's property, in the action before mentioned, and judgment on the notes was afterwards, on the fifteenth day of May, 1882, obtained against Linville, and an execution issued thereon, and levied upon the property which had been, and was then held, by the defendant under attachment.

The law under which these receipts were issued is entitled "An act in relation to warehouse and wharfinger receipts," etc., and is found on page 950 of the acts of 1878. Section 5 thereof is as follows:

"Warehouse receipts for property stored shall be of two classes: *first*, transferable or negotiable, and, *second*, non-transferable or non-negotiable. Under the first of these classes *all property shall be transferable* by the indorsement of the party to whose order such receipt may be issued, and such indorsement of the party shall be a *valid transfer of the property* represented by such receipt, and may be in blank or to the order of another."

Section 8 provides:

"All receipts issued by any warehouseman or other person under this act, other than negotiable, shall have printed across their face, in bold distinct letters, in red ink, the words 'non-negotiable.'"

The receipts under consideration were without those words in red ink. Upon their face it was agreed that the goods which they called for should be delivered to whomsoever returned them, properly indorsed, on payment of storage. A proper indorsement could only mean that of Linville, the party for whose account they were issued. The receipts, therefore, were negotiable, and by the terms of the act above mentioned they carried with them, by mere indorsement of the proper party, viz., Linville, the title to the wool against all the world. It was perfectly competent for the legislature in its wisdom, for the convenience of commerce, to declare such instruments negotiable, and to make their proper transfer by indorsement carry with it the absolute, free, and unconditional title to the property specified in them, while remaining in the hands of the warehouseman. The object and intent of the law seems to be that the warehouseman holds property embraced in such an instrument, as the property of any individual, who, after its issuance, returns it to him, indorsed by the person for and on account of whom it was originally stored. It was intended to do away with the necessity of any attornment of the warehouseman to the holder, by the indorsement of such a receipt, as a condition precedent to the transfer of the title and possession of the property. By proper indorsement such a receipt carries with it the absolute title to the property mentioned therein, as much so as the transfer by indorsement of a certificate of deposit of a bank, which states that the money it calls for is deposited to the credit of an individual, and that it will be paid on the return of the certificate properly indorsed invests the title to and right of possession of such money in the indorsee.

It follows that the plaintiff should have had judgment for the 30 bags of wool, or the value thereof, in case a delivery could not be had, and damages for the detention thereof. And the judgment should be reversed, and cause remanded.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded with directions to render judgment for plaintiff for 30 bags of wool, or the value thereof,

in case a delivery cannot be had, and damages for the detention thereof.

THORNTON, J. I dissent. I find no error in the record, and think the judgment should be affirmed.

(89 Cal. 75)

BAGGETT v. DUNN. (No. 11,337.)

Filed March 9, 1886.

DEPUTY SUPREME COURT REPORTER—PAYMENT OF SALARY OF.

If the appropriation for the purpose of paying the salary of the deputy supreme court reporter has been exhausted, and there is no money in the general fund in the state treasury which has not been appropriated to some other purpose, the state comptroller cannot be compelled to draw his warrant in payment of such salary, under the California act of February 26, 1881.

In bank. Application for writ of mandate.

*William T. Baggett*, for petitioner.

*R. T. Devlin* and *R. M. Clarken*, for respondent.

THORNTON, J. Application for a writ of mandate compelling the respondent, as comptroller of state, to draw his warrant on the state treasury in favor of petitioner, Baggett, payable out of the general fund, for the sum of \$200, as salary of petitioner, as deputy supreme court reporter, for the month of July, 1885. The act authorizing the appointment of deputy supreme court reporter was passed February 26, 1881, (St. 1881, p. 9,) and is entitled "An act to provide for the appointment of a deputy supreme court reporter, and to regulate his compensation." The act is in these words:

"Section 1. The reporter of the decisions of the supreme court is hereby authorized to appoint a deputy, and such deputy shall hold his office at the will of the reporter.

"Sec. 2. The salary of such deputy shall be \$2,400 per annum, payable monthly, out of any money in the general fund not otherwise appropriated, and the comptroller of state is hereby authorized and directed to draw his warrants monthly for such purpose, and the state treasurer is hereby authorized and directed to pay the same.

"Sec. 3. This act shall take effect from and after its passage."

The answer of respondent denies that it is his duty to draw a warrant in favor of the petitioner for the amount stated in his application or for any amount whatever.

It avers that, as provided by section 433, sub. 17 of the Political Code, one of the conditions the existence of which is necessary to enable the respondent to draw a warrant is that there must be an unexhausted specific appropriation provided by law to meet the same; that there is no unexhausted specific appropriation to meet the claim of petitioner; that the legislature, at its last session, wholly failed to make any appropriation whatever to meet or pay his claim. It is further averred that the legislature of the state of California by the appropriation act of 1883, entitled "An act making appropriations

for the support of the government of the state for the thirty-fifth and thirtieth fiscal years," approved March 9, 1883, (see St. 1883, p. 78,) made the following appropriation: "For salary of deputy reporter of the decisions of the supreme court, four thousand eight hundred dollars;" that all of this appropriation has by warrant thereon been exhausted, and that there is now no money appropriated to pay petitioner's claim. It is also averred that there is not now, nor at any times mentioned in the application of petitioner has there been, any money in the general fund not appropriated to some purpose, and that there are no moneys in such fund, nor have there been any to its credit since July 1, 1885, which are not covered by and subject to specific appropriations.

We have stated in full the answer of the respondent, perhaps more so than necessary. The question which is determinative of the case is this: Has any appropriation been made to pay the demand of the petitioner? If no such appropriation has been made by the legislature, this court cannot order a mandate to the comptroller to issue a warrant for its payment, for it is the clear command of the constitution, which cannot be disregarded, that no money shall be drawn from the treasury, but in consequence of appropriations made by law. Const. art. 4, § 22. That is made either by the constitution or by an act of the legislature. *McCauley v. Brooks*, 16 Cal. 29.

The respondent contends that the appropriation is made by the second section of the act of 1881 above quoted. That section provides that the salary mentioned in it shall be \$2,400, "*payable monthly out of any money in the general fund not otherwise appropriated.*" Not otherwise appropriated when? Clearly and manifestly either at the date of the act, (twenty-sixth of February, 1881,) or at the date of the last appropriation act passed by the legislature then in session. We cannot construe this language as applying to any subsequent legislature, and directing an appropriation for the payment of the salary referred to out of a general fund not otherwise appropriated, which may afterwards be paid into the treasury to be appropriated by a subsequent legislature to the purposes for which such fund is designed. If the act of 1881 referred to such fund, which would subsequently come into the treasury, it would be an appropriation in advance of any appropriation which would be made by the legislature which was to deal with it, and there would then be no necessity for using the words "*not otherwise appropriated,*" for, the subsequent legislature not having convened, there would then have been none of the general fund appropriated, and the prior act of 1881 would then be referred to a fund from which no appropriation had been made, and the use of the words "*not otherwise appropriated*" would be totally unnecessary. If the words of appropriation used in the act of 1881 had reference to such subsequent general fund, it would be the first appropriation from the fund, and the words "*not otherwise appropriated*" would be useless and superfluous.

It follows from the foregoing that the appropriation made by the act of 1881, conceding, but not deciding, that such an appropriation is there made, terminated with the fiscal year ending thirtieth of June, 1883. This seems to have been the view of the legislature which passed the act of 1883, making appropriations for the support of the state government for the thirty-fifth and thirty-sixth fiscal years. In that act a distinct and definite appropriation was made for the fiscal years mentioned, succeeding the period for which the appropriation was made by the act of 1881, for the payment of the salary in question. It is reasonable to conclude that the legislature in 1883 considered the appropriation made by the act of 1881 at an end, and therefore made an appropriation for the fiscal years above mentioned. In our judgment this view of the legislature of 1883 was correct. The appropriation so made by the act of 1883 had been exhausted by payments when the demand of the petitioner was preferred. This is not denied, but conceded. Nothing is claimed from the appropriation of 1883. We can find no other appropriations made than those above mentioned. These appropriations have been exhausted by payments, and, no other appropriation having been made, this court has no authority to order the issuance of the writ asked for, and it must therefore be denied.

The application herein is denied and the proceeding dismissed. So ordered.

We concur: MYRICK, J.; MCKEE, J.; SHARPSTEIN, J.; MCKINSTRY, J.

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ELLIS v. JUDSON. (No. 11,474.)

Filed March 9, 1886.

MOTION TO DISMISS APPEAL DENIED.

In bank. Appeal from superior court, city and county of San Francisco. Motion to dismiss appeal.

*M. G. Cobb*, for appellant.

*P. G. Galpin*, for respondent.

By THE COURT. Motion to dismiss appeal on clerk's certificate. A notice of appeal was filed without admission of service thereof. The motion must be denied. So ordered. See *Frederick v. Tierney*, 54 Cal. 583; *Gurnen v. Garrity*, (11,453,) ante, 118, decided February 25, 1886.

(68 Cal. 688)

**MATTHEWS v. SUPERIOR COURT OF MARIN COUNTY and others. (No. 11,292.)**

Filed February 27, 1886.

**NEW TRIAL—POWER OF JUDGE TO MAKE ORDER OUT OF COUNTY OF TRIAL.**

The judge who presided in court at the trial of a cause in another county in place of the judge thereof, who was disqualified, has authority to grant an order extending the time to prepare and serve a statement, on motion for a new trial, although such order be made in a county other than that in which the cause was tried.

Department 2. Application for writ of review.

*James F. Smith*, for petitioner.

*Hepburn Wilkins*, for respondent.

BY THE COURT. Application for a writ of review. The cause of *Coughran v. Matthews*, the applicant for the writ here, was appealed by Matthews to the superior court of the county of Marin, from a judgment rendered in a justice's court; and the Hon. E. B. MAHON, the judge of the superior court above named, being disqualified to try the cause on appeal, the Hon. J. F. SULLIVAN, a judge of the superior court for the city and county of San Francisco, at the request of Judge MAHON, presided at the trial of the appeal above stated. On this trial a verdict was returned, and judgment was rendered for the plaintiff. Matthews, within the proper time, regularly gave notice of his intention to move for a new trial on various grounds, among which were insufficiency of the evidence to justify the verdict, and errors of law occurring at the trial and excepted to by the defendant. The time for defendant to prepare and serve a statement on motion for new trial was extended, by agreement, until the fourteenth day of May, 1885, after which, by order of Judge SULLIVAN, the time was further extended to the twenty-ninth of the same month, and by another order of the same judge the time was again extended to the thirteenth of June, 1885. It does not appear when the first of these orders was made by Judge SULLIVAN, but the second order shows on its face that it was made at San Francisco. The statement was prepared and served within the time thus extended. To this statement the attorney for plaintiff proposed amendments, reserving at the same time an objection that the statement was not served in time as required by law; and that no extension of the time allowed by law to serve the statement was ever made by the superior court of Marin county, or any judge thereof, and that the extensions granted by order of Judge SULLIVAN were made by him in the city and county of San Francisco, within which city and county Judge SULLIVAN had no power to grant such orders; and that the said judge had no power to make such orders except while he was holding court in Marin county. On motion of plaintiff's attorney the motion for a new trial was, on the twenty-sixth of September, 1885, dismissed. This dismissal was ordered by the court, Judge SULLIVAN presiding.

It is argued here that the defendant's motion for a new trial was

dismissed on the ground that the orders of Judge SULLIVAN, made in the city and county of San Francisco, extending the time to prepare and serve the statement were without authority; that, therefore, there was no extension of such time made, and the statement was not filed in time.

The order dismissing the motion is as follows:

"Plaintiff's motion to dismiss defendant's motion for a new trial having been fully considered, and now on this day the court being fully advised, it is ordered that the same be and is hereby granted, and that said motion for a new trial be dismissed."

It does not appear, *in terms, in the order*, on what ground the motion was dismissed, and it is argued from this that we must presume that the motion was granted on some proper ground. But the order refers to "*plaintiff's motion*," and the only notice of such motion was the one given in his objection and grounds above stated to the statement as not in time, and it is fair and just to presume that the court dismissed it on such grounds.

The question then arises, is such an order, made by a judge of another court, who presided at the trial in place of the judge of the court in which the cause is tried, who was disqualified, made without authority, when granted in a county other than that in which the cause is tried? It would be strange if the law did not give power to the judge who tried the cause to make such orders. It would be hard on litigants if when such orders, which are usually made when applied for, are needed, the judge who had tried the cause should be without authority of law to make them unless in the county where the cause had been tried. If such is the law, the judge must leave his own county and visit the county of trial to make the simplest order applied for in the cause. Such order, too, having no relation to the merits, but relating to a *mere matter of procedure* to put a phase of the cause in a condition to be heard.

The judge who tried the cause is the proper judge to settle the statement. Section 659, sub. 3, Code Civil Proc. He can, therefore, take all necessary steps to have it properly settled. For this purpose he can extend the time for its proper preparation for settlement. This power to extend need not be exercised by the judge in court. Sections 166, 176, Code Civil Proc. Such extensions may be made by a judge at chambers. Section 166, Code Civil Proc. Orders made out of court may be made by the judge of the court in any part of the state. Section 1004, Code Civil Proc. The motions referred to in section 1004, just cited, which by it are required to be made in the county or city and county in which the action is pending, in our opinion refer to such motions as must be made and heard in court, and not to *ex parte* motions which may be made and passed on at chambers.

Judge SULLIVAN, as to this power to extend time to prepare and serve a statement, was, in our judgment, invested with the same

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powers as the judge of the court where the cause was pending would have had if not disqualified. He was, as regards the cause he had tried, the judge of the superior court of Marin county, and could make the extension orders granted by him in any part of the state. Under these circumstances the learned judge had no power or jurisdiction to dismiss the motion for a new trial. He was vested with jurisdiction to settle the statement and hear the motion, and he was without jurisdiction to decline to do so.

The order dismissing the motion for a new trial must be quashed and annulled, and it is so ordered.

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(2 Cal. Unrep. 649)

**CHILDS v. EDMUNDS, Judge, etc. (No. 11,498.)**

Filed March 9, 1886.

**PROHIBITION—WRIT OF ASSISTANCE.**

The enforcement of a writ of assistance, as against one not a party to the action, cannot be restrained by a writ of prohibition, as there is in such case an adequate remedy at law by appeal from the order granting the writ.

In bank. Application for writ of prohibition to restrain the enforcement of a writ of assistance, obtained against petitioner for the purpose of dispossessing him, in a foreclosure suit to which he was not a party.

*E. A. & G. E. Lawrence*, for petitioner.

*J. R. Brandon*, for respondent.

By THE COURT. The application for a writ of prohibition in this case is denied for the reason that petitioner has an adequate remedy by appeal from the order complained of.

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(69 Cal. 80)

**RANDALL v. HUNTER. (No. 11,237.)**

Filed March 12, 1886.

**1. APPEAL—NOTICE TO ADVERSE PARTY.**

Under the California Code of Civil Procedure, which required that a notice of appeal must be served on the adverse party, if the reversal or modification of the judgment or order appealed from will affect the interest of a co-defendant in the subject-matter of the appeal, he is an adverse party, upon an appeal by another defendant.

**2. SAME—SERVICE—DEFAULT JUDGMENT AGAINST CO-DEFENDANT.**

In an action against partners on a partnership demand, on default by one of the defendants, and judgment after trial against the others, the defendant making the default is not an adverse party to an appeal taken by the other defendants, so as to require service of notice of appeal on him.

Department 2. Appeal from superior court, county of Humboldt.

*J. D. H. Chamberlain*, for appellant.

*J. J. De Haven* and *S. M. Buck*, for respondent.

THORNTON, J. Motion to dismiss appeals. Randall sued Hunter and Gill, as partners, on a promissory note signed Gill & Hunter. Gill made no defense, and judgment passed against him by default.

Hunter answered, and denied the execution of the note by Gill & Hunter as partners, and further alleged that the note was executed to plaintiff by Gill without the knowledge or consent of Hunter; that it was not executed for the use and benefit of the firm of Gill & Hunter, but for the individual use and benefit of Gill alone; that the whole consideration for the note passed to the sole use of Gill, and none of it to the firm; that when plaintiff received this note on its execution, and paid to Gill the consideration therefor, he knew all the foregoing facts, and further knew that the firm was not to receive, and did not receive, any portion of the consideration for said note.

On this answer, trial was had, which resulted in a verdict against Hunter, and judgment was entered against both defendants,—against Gill on his default, and against Hunter on the verdict. Hunter moved for a new trial, which was denied. He then appealed from the judgment, and from the order denying his motion for a new trial. The notice of appeal was not served on Gill, but on plaintiff only. Plaintiff now moves to dismiss the appeals on the ground of the failure of Hunter to serve the notice of appeal on his co-defendant, Gill.

By the provisions of the statute, the notice required to take an appeal must be served on the "*adverse party*." Code Civil Proc. § 940. If the reversal or modification of the judgment or order appealed from will affect the interest of Gill in the subject-matter of the appeal, he would be an adverse party within the meaning of the section above cited. *Senter v. Bernal*, 38 Cal. 637; *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Williams v. Santa Clara M. Co.*, 5 Pac. Rep. 85.

Now, it appears here that Gill has not appealed, and the judgment appealed from was rendered against him by default. If the judgment as to Hunter is reversed, it would still stand unreversed as to Gill, and therefore he would not be affected by a reversal. If the judgment is affirmed, the judgment appealed from would remain unchanged, and manifestly Gill's interest would not be affected by the judgment of affirmance. Whatever modification might be made of the judgment rendered by the court below, or whatever judgment might be here rendered, the judgment by default would still remain against Gill.

It is said that if the judgment is reversed another trial might result in a several judgment against Gill, whereas the judgment against him is now a joint judgment,—one against him and Hunter; and that he is interested in preserving the joint judgment against him, and preventing a several judgment as to him. But his default admits that he is bound severally as well as jointly. If on the trial which has taken place a verdict had passed in Hunter's favor, a judgment by default might have been entered against him (Gill) severally. A reversal of the judgment appealed from would not do away with this default. It would only affect the judgment as to Hunter. As long as the default stands, whatever judgment is rendered here would not affect the judgment against Gill. In this view we do not think Gill was an adverse party upon whom the notice of appeal should have been served.

What is said above applies to the appeal from the order as well as from the judgment.

It follows from what has been said herein that the motion must be denied, and it is so ordered.

We concur: McKee, J., Sharpstein, J.

## SUPREME COURT OF NEVADA.

(19 Nev. 237)

## STATE v. WARD.

Filed March 15, 1886.

## 1. LARCENY—INDICTMENT FOR HORSE STEALING.

In an indictment against one accused of grand larceny of two horses, a saddle, and a horse blanket, it is proper to include all the articles stolen in the same charge.

## 2. SAME—JURY—INTENT, FROM WHAT TO BE GATHERED.

In a trial upon an indictment for larceny the jury are to consider all the evidence in order to find the question of intent in the taking.<sup>1</sup>

## 3. SAME—FACTS AS PROVING INTENT TO PERMANENTLY DEPRIVE OWNER OF HIS PROPERTY.

The facts that one took a horse from the premises of its owner, without the latter's knowledge or consent, rode it for a certain distance, and then abandoned it, after removing and concealing the saddle and blanket, are sufficient to justify a finding of intent to permanently deprive the owner of his property, although the person charged has testified that he expected some one to take the property back, or that he expected the animal to stray back.<sup>1</sup>

## 4. CRIMINAL LAW—INSTRUCTION TO JURY—REFUSAL TO REPEAT SUBSTANTIALLY SAME INSTRUCTION.

The court having once charged the jury generally upon a particular point, it is not error to decline to repeat the instruction in different language at the defendant's request.

## 5. EVIDENCE—EXPRESSION OF ALLEGED CONFEDERATE—FOUNDATION FOR EVIDENCE—ERROR, HOW CURED.

The expressions of an alleged confederate not being competent evidence against the accused without proof of conspiracy, if such expressions are admitted without such a foundation being first laid, the error is cured by subsequent evidence of the conspiracy.

Appeal from judgment of Fourth judicial district court, Elko county, upon a verdict convicting the defendant of grand larceny.

*J. H. Rand*, for appellant.

*The Attorney General*, for the state.

LEONARD, J. Appellant was convicted of the crime of grand larceny. He was jointly indicted with John Hennessey, but had a separate trial.

1. The demurrer to the indictment was properly overruled. The indictment did not charge the commission of two distinct offenses, to-wit, grand and petit larceny. The charge was that defendants willfully and feloniously stole, took, carried, led, and drove away two horses, described, of the value of \$150, and, at the same time and place, willfully and feloniously stole, took, and carried away, together with the said two horses, one saddle, of the value of \$25, and one blanket, of the value of \$8, all the property of W. B. Gibbs. The stealing of the horses, saddle, and blanket at the same time and place constituted but one crime, and but one offense was charged. A trial

<sup>1</sup>See note at end of case.

and acquittal upon an indictment charging larceny of the horses only would have been a bar against a prosecution for stealing the saddle and blanket. *Waters v. People*, 104 Ill. 544; *State v. McCormack*, 8 Or. 236.

2. It is strenuously urged that the court erred in refusing to grant a new trial by reason of alleged misconduct of the jury in separating, without leave of the court, after retiring to deliberate upon their verdict, and in talking with persons not members of the jury, by which misconduct appellant was prevented from having a fair consideration of his case. The affidavits in support of the claim of misconduct are numerous, and those against it are equally so. We have examined them carefully, but shall not undertake the task of reviewing them in detail. It is undoubtedly the law that the defendant in any criminal case is entitled, as a matter of right, to require, in the first instance, a compliance with the ordinary forms of law to secure him a fair and impartial trial; and if the provisions of law intended for his security are disregarded, he may require satisfactory evidence from the state that he has not been injured by reason of such non-compliance. Conceding that there was a separation, and that the wife of one of the jurors spoke to her husband in the presence of three other jurors, but not about the case; and that, under the circumstances shown, the burden of proving that there was no prejudice to appellant resulting from the irregularities complained of was upon the state,—we feel certain that the court did not err in refusing a new trial upon this ground. The showing made by the state convinced the court below, as it does us, that there was no tampering with any juror; that no juror had any communication with any person other than a juror in relation to the case, or received any impressions except those derived from the trial. *State v. Jones*, 7 Nev. 413; *Davis v. State*, 3 Tex. App. 101; *State v. Harris*, 12 Nev. 421.

3. It is contended that the court erred in giving and refusing certain instructions to the jury. Appellant, when testifying as a witness in his own behalf, admitted that he and Hennessy went from Wells, on the Central Pacific Railroad, to the ranch of Gibbs, about 15 miles distant, according to a previous arrangement so to do; and at about 9 o'clock in the evening, without consent of the owner, took the two horses, saddle, and blanket described in the indictment from the premises where they were kept, rode them to a place about 20 miles from the state line, and then returned to a point 12 miles from Toano and the railroad, where they took the saddles from the horses, left them in the sage-brush beside the road, and abandoned the entire property. He testified that neither he nor Hennessy intended to steal the property; that they only took it to use three or four days, to enable them to leave the state; that the intention was that it should be returned to Gibbs; that he made an arrangement with one Jack Thomas, at Wells, the night before the property was taken, to meet him and Hennessy near Six Mile canon, and take the property

back to Gibbs; that Thomas did not meet them as agreed, and not wishing to ride the horses into Toano, they left the property, thinking Thomas would get it, and if he failed to do so, the horses would go home anyway.

The court instructed the jury that if they were satisfied, beyond a reasonable doubt, that appellant, in connection with Hennessy, took the horses with the intention of permanently depriving the owner of his property, and without intending to return them, it was a felonious intent, and they should find him guilty; that if he took them with the intention of using them temporarily only, and then returning them to their owner, he was not guilty; that in order to justify the jury in convicting appellant, it was not necessary they should find that he intended to convert the property to his own use, that is, to keep it permanently himself, or dispose of it to others; that the jury were to determine whether or not he made any arrangement with Thomas to take the horses back, but that such arrangement, if made, would amount to nothing, unless entered into in good faith, and appellant really and honestly believed, at the time he took the property, that Thomas would meet him and take the horses back to the owner; that if he took them with the intention of permanently depriving the owner of them, and without really intending to return them, a subsequent abandonment of them, and allowing their owner to recover them again, would not prevent such taking from being grand larceny. On behalf of appellant the court charged the jury that they should acquit unless they believed from the evidence admitted that appellant, when he took the property, intended to deprive the owner of the same permanently.

From these instructions it is urged that "the jury might have understood that, in order to escape a verdict of guilty, it was necessary that appellant should have intended to return the horses to the possession of Gibbs, and that such is not the law." It is not claimed that it was error to tell the jury that "the appellant was not guilty if he took the horses with the intention of returning them to their owner, after a temporary use," as he had testified his intention was. That was good law, and favorable to him. It was in perfect accord with appellant's theory of the case; and if his counsel thought that from the court's instruction, although correct so far as it went, the jury might think it was necessary that appellant should have intended to return the property, and that such was not the law, he should have asked, in plain language, an instruction covering the point now made.

In order to find appellant guilty, the jury were bound to believe, from all the evidence, that he intended to deprive the owner permanently of his property. The jury did not believe that appellant intended to return it. Having discarded that theory, the intention had to be gathered from acts alone. Now, it may be that a person might take another's property, and carry it away, without intending

to return it, but without intending a permanent deprivation. His acts, including his treatment of the property, and the circumstances surrounding the taking, might show the latter intention in the absence of the former. But since the jury, after discarding appellant's *alleged* intention, had to decide, *by acts alone*, as to his *real* intention at the time of taking; and since he is presumed to have intended the natural consequences of his acts, in the absence of an intention to return the property,—if the jury were satisfied, beyond a reasonable doubt, that he used the property in such a manner that the owner would be likely to be permanently deprived of it, the presumption is that he intended to so use it, and the burden was upon him to rebut such presumption by competent evidence. So the jury were charged by appellant's eleventh instruction, which declared the law correctly in case he did not intend to return the property.

It is contended, also, that the court erred, in refusing to give instructions 2, 6, 7, 8, and 9 asked by appellant. Every correct principle of law embodied in the second request was given by the court in other instructions. But it contained the following, which was properly refused: “\* \* \* and if, from all the evidence, the jury have a reasonable doubt whether or not defendant intended to steal the property, or any part thereof, or only to use it for a limited period of time, and then allow it to return, or be returned, to the owner, then you should acquit the defendant.” That would have been a charge to acquit if they found that he intended to use the property temporarily, and then abandon it, after several days' use, a long distance away, regardless of whether he expected, or had reason to expect, that the owner would recover it in the natural course of events, or at all. In regard to this it is enough to say that from such intended use, abandonment, reckless exposure to loss, and other facts in the case, a jury might well find an intention to permanently deprive the owner of his property; and it was not for the court to say that a permanent deprivation was not intended, simply because appellant's primary intention was to use it temporarily, and then forsake it, if such it was.

By the sixth instruction the court was asked to charge that appellant was entitled to an acquittal unless the jury were satisfied, beyond a reasonable doubt, that he and Hennessy “intended to assume property in the property taken, or some portion thereof, or to permanently deprive the owner of his property, or some part thereof.” As before stated, in several other instructions, the court had properly charged concerning the intent necessary to constitute larceny, and that was sufficient. When the wrongful taking and asportation are admitted, as in this instance, the state's case is made out upon proof of a felonious intent at the time of taking; and the intent is felonious when the purpose is to deprive the owner permanently of his property, no matter by what means, whether “by assuming property in the property,” or otherwise.

The seventh request is as follows:

"The jury are instructed that if they believe, from the evidence in the case, the defendant Ward and his co-defendant Hennessy went to the premises of W. B. Gibbs, in the night time, and took away therefrom the property described in the indictment, for the purpose of riding the horses, blanket, and saddle to some place near the Central Pacific Railroad, and then to leave the horses, blanket, and saddle at such point, and where the owner would probably recover his property; and not intending to return the said property, or any part thereof, to the possession of the owner, themselves, but not intending to make any further use of said property, or to permanently deprive the owner of his ownership in his property, or the use thereof,—then the defendant is not guilty of the offense charged in the indictment, and it is your duty to acquit, and upon the question of *intent* the defendant is entitled to the benefit of every reasonable doubt."

This instruction was ingeniously written, but it was properly refused. It was misleading, and instead of enlightening the jury it would have confused them. The only evidence in the case that would have justified an instruction upon the theory that they intended to leave the property anywhere was the fact itself *that it was left* or abandoned about 12 miles from Toano, and from the railroad; although appellant testified that they did not intend to leave it, but did intend to send it back by Thomas, and that the abandonment was an afterthought. It is urged by the attorney general that, under such circumstances appellant was not entitled to an instruction, otherwise correct, upon the theory that defendants intended to leave the property; that appellant knew his intention, and, having stated it, he was not entitled to an instruction upon the theory of subsequent abandonment. We shall not stop to consider this question; nor shall we consider whether appellant could take property as this was taken, for the purpose stated in the instruction, with no intention of returning it, or having it returned, but intending to leave it a long distance away, where the owner would *probably* recover it, without intending to permanently deprive the owner of it; whether a *probability* of recovery, dependent upon chance and the vigilance and industry of the owner, is sufficient in law to relieve appellant of the imputation of a felonious intent. But we do not hesitate to say that, in such a case, the finding of a jury that a permanent deprivation of property was intended is supported by the facts stated. *State v. Davis*, 38 N. J. Law, 178; *State v. Slingerland*, 7 Pac. Rep. 280.

There was no testimony to the effect that "the owner would probably recover the property" if left where it was abandoned, 12 miles from Toano, or that appellant had good reason to think it would be recovered. He testified that he thought the horses would go home, but that did not tend to show any fact from which the jury could say there was any probability that the owner would recover them. Gibbs, the owner, stated that the horses were born and raised in the vicinity of, and were accustomed to, his ranch. In eight or ten days after they were taken they were found by Gibbs at his ranch. But there was no evidence that, as a rule, horses turned loose, as far away as these were, would go home, or that these would probably do so.

Again, as before stated, the only evidence that defendants intended to leave the property anywhere was the fact *that it was left* at a place about 12 miles from Toano. Upon this state of facts it would have been misleading to have charged the jury upon the hypothesis that "they took the property for the purpose of riding it to *some* place near the railroad, and then to leave it *at such point, and where the owner would probably recover it.*" The statement should have accorded with the facts. As to the place to which they intended to ride, and there to leave the property, the jury should have been limited to the place where it was left. There may have been many points "near the railroad" from which it would have been much more probable that the owner would recover his property than from the place where it was left, and the language of the instruction permitted the jury to include such points as the place where defendants intended to leave the property.

The eighth request was to the effect that "if the jury found defendant took and rode the property to some point near the line of the Central Pacific Railroad, and voluntarily abandoned it, and did not intend to make any further use thereof, they should consider that fact as a circumstance in determining the motive of the defendant in taking it." It would have been uncertain which of the several facts enumerated the jury were to consider as a circumstance; but conceding that the fact referred to was the last one mentioned, the jury might have concluded that an intent at the time of abandonment, instead of at the time of taking, to make no further use of the property, was a circumstance for them to consider. This instruction is objectionable, also, for the reasons last expressed concerning appellant's seventh request. In determining appellant's intent, it was the jury's duty to consider all the evidence in the case, and so they were instructed. But, without considering the objections to this request already stated, it must be admitted that if the court erred in refusing to give it, then, after charging the jury to consider all the facts in the case, it would have been equally the court's duty to give others, if asked, upon every important circumstance disclosed at the trial, and explanatory charges for the other side. There must be an end to the giving of instructions, and the tendency of courts is to give too many.

We agree with the supreme court of Missouri:

"A few plain propositions, embracing the law upon the facts of the case, are greatly to be preferred, in every case, to a long string of instructions, running into each other, and involved in intricacies, requiring as much elucidation as the facts of the case themselves." *State v. Mix*, 15 Mo. 113.

"This court will not reverse the judgment of the court below for the refusal to give instructions, provided it appears from the record that the law of the case has been laid down properly and fairly by the court in instructions which it did give to the jury. Instructions are to enable the jury to understand the law of the case. A few short, pithy, sententious instructions, embodying the law of the case, will always be better understood, and will have

more effect upon the triers of fact, than a long list of instructions loaded with words, generally so involved that it tends to confuse rather than conduct the jury to a proper conclusion." *State v. Floyd*, Id. 250.

In this case, where the only question of fact was as to appellant's intention at the time the property was taken, the instructions given and refused cover 26 pages of the transcript. "In charging the jury it should be the aim of the court not to give undue prominence to any phase of fact which the testimony tends to establish. If there be apparent incompleteness or weakness of proof on any of the controverted issues in the cause, counsel will usually dwell on this in argument. \* \* \* But when parties ask a charge which isolates certain enumerated facts or circumstances, real or supposed, and invoke the instruction of the court on these, as circumstances especially to be weighed in the cause, the usual result is to give such facts and circumstances great, if not undue, prominence before the jury; and if given, the charge should be accompanied with a fair and candid statement of any facts and circumstances which point to the opposite conclusion. Less than this is apt to leave on the minds of the jury an impression that the convictions of the presiding judge incline in favor of the party such instructions are supposed to benefit; and the supposed bias is none the less patent and apparent, even though, in giving such charge, the court adds: 'These circumstances are to be considered with the other evidence in the case.'" *Durrett v. State*, 62 Ala. 441; and see *Castro v. Illies*, 22 Tex. 503; *McCartney v. McMullen*, 38 Ill. 240; *Blankenship v. Douglas*, 26 Tex. 230; *State v. Homes*, 17 Mo. 379; *Carroll v. Paul's Adm'r*, 16 Mo. 241, 242.

The same reasoning applies to appellant's tenth request.

As to the ninth it is sufficient to say that, admitting the proposition therein stated to be correct as a legal principle, it was entirely inapplicable to the facts of this case, in view of the many suspicious facts and circumstances disclosed by the evidence.

The instruction found on page 63 of the transcript, refused by the court, should not have been given. It was the province of the jury, and not the court, to say what credit should be given to appellant's testimony. The court treated the entire page as one request, and we have no means of knowing that it was error to do so. We think the jury was fairly instructed.

4. W. J. Brown, a witness for the state, who lived about 18 miles from Wells, and 30 miles from Gibbs' ranch, testified that on the day after the property was taken he saw appellant and Hennessy at his place, where they got breakfast and fed their horses,—those described in the indictment. Witness was asked "if he heard Hennessy say what they were doing." It was admitted that appellant was not present, and his counsel objected to the question because "no foundation had been laid to bind Ward by Hennessy's declaration; that no conspiracy had been shown, and the offense, if any, had been consum-

mated." The objections were overruled, and the witness answered that, to the best of his recollection, Hennessy said, "'We are going out to fetch in some mavericks;' though he might have said, 'I am going out.'" Witness afterwards said:

"I had asked Hennessy what they intended to do. I have a few head of cattle, and I asked him if he intended to bother them. Hennessy said, 'No;' that I was a poor man, and had worked hard for what I had, and they would not bother my stock. Hennessy said, first, they would not bother my stock. Ward then came in, and Hennessy said again, in his presence, that they would not bother my stock. Ward said nothing."

At the trial appellant did not pretend that they were, in fact, hunting mavericks.

It is claimed by the state that this testimony was material as tending to show that Hennessy's object was to divert suspicion from both defendants. We are of the same opinion, and it becomes necessary, therefore, to decide whether this declaration, made in the absence of appellant, was admissible as against the latter. "In cases of crimes perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice, in the prosecution of the enterprise, is considered the act or declaration of all, and therefore imputable to all. All are deemed to assent to, or command, what is said or done by any one in furtherance of the common object." Whart. Crim. Ev. § 698; 3 Greenl. Ev. § 94; *Hannon v. State*, 5 Tex. App. 550.

If, as claimed, the declaration in question was not strictly admissible at the time it was received, because the conspiracy had not been fully shown, its admission was not a reversible error, since the conspiracy was shown subsequently. Whart. Crim. Ev. §§ 698, 698a; 3 Greenl. Ev. § 92; *Scott v. State*, 30 Ala. 509; *Avery v. State*, 10 Tex. App. 210; *State v. Cardoza*, 11 S. C. 237.

The evidence, including the testimony of appellant, shows a conspiracy, and Hennessy's declaration was admissible, if it was made while the conspiracy was pending, and in furtherance of the common design. Upon this point it is enough to say that, at the time the declaration was made, they were engaged in carrying out what they had previously agreed to do. They had agreed, not only to take the horses, etc., but to ride them three or four days, to some place near the eastern part of the state, where they could safely take the cars.

In *Scott v. State*, *supra*, the court said:

"The strongest argument for the plaintiff in error against admitting as evidence against him the payment of double toll by West, is that the payment was made after the larceny of the watch was, in legal contemplation, complete as to West. \* \* \* Conceding that the payment of double toll was made after West had done enough to authorize his conviction for the larceny of the watch, yet there is evidence which conduces strongly to show that it was made 'while the conspiracy was pending, and in furtherance of the common design.' The evidence justifies the conclusion that the conspiracy between West and the plaintiff in error was not confined to the mere felonious taking and carrying away of the watch, but extended to a division of the profits of

the larceny at a meeting to be held between them at another place as soon as convenient. Having given to their conspiracy that extent, neither of them, when indicted, has the right to call upon the court to diminish its extent for the purpose of relieving him from any of its consequences." See, also, *State v. Grant*, 76 Mo. 245; *Miller v. Dayton*, 57 Iowa, 429; S. C. 10 N. W. Rep. 814; *State v. Brown*, 7 Or. 207.

The court did not err in admitting Hennessy's declaration.

5. After appellant had testified that he and Hennessy took the property merely for the purpose of riding it three or four days to enable him to leave the state, but that they did not intend to steal; that they expected Thomas would come and return the property to Gibbs; that he told Brown they were getting away from trouble at Wells, &c.,—he was asked by his attorney "why it was he did not leave Wells on the train." The state objected to the question, and appellant's attorney stated that—

"In connection with said question he proposed to prove that defendant had contracted a number of debts, aggregating a large sum of money; that he had paid out all the money he had, and had nothing wherewith to pay the debts; that he had been told and believed his creditors at Wells intended to attach and take away from him every cent he could make; that he intended to go out of the state, and secure employment, and thereby make sufficient money to pay the just claims against him; that he did not believe he could ever pay his creditors if continually sued and harassed by them; that he intended to leave on the east-bound train, but when the train arrived at Wells he saw the constable and justice watching the train, and thought he would be arrested, and brought back as an absconding debtor, if he boarded the train; that he knew of several instances where parties owing money had attempted to leave the state, and had been arrested and brought back; that he concluded he could not safely leave Wells on the train, and he and Hennessy agreed to get horses, and ride them to some point near the eastern border of the state, where they could safely take the train and depart."

It is admitted that the reasons offered were no excuse for taking the property, but it is said that since his defense was that he took it, not intending to steal it, but only to use it in getting out of the state, he had the right to explain why he did not go away in the usual manner, on the cars. A man may be guilty of larceny without intending to appropriate the property permanently to his own use. Appellant was guilty if he intended, at the time of the taking, to deprive the owner of it permanently. If the jury had believed that he was afraid of being arrested and brought back, although from the proposed showing his fear was groundless, his testimony would have shown why he went over the country on horseback instead of traveling by rail; just as it would if he had said he did not go on the cars because he had no money to buy a ticket, or because car-riding made him sick, or because he was afraid the cars would run off the track; but whether in taking the horses, no matter why, he was guilty of larceny, would still have depended upon whether he intended to deprive the owner of them permanently, although he would not have taken them at all if he had not feared arrest; and in deciding upon his intent the jury would have been obliged to judge from facts and cir-

circumstances outside of the reason why he did not go by rail. A belief by the jury that he would have gone away on the cars, and would not have taken the horses, if he had not feared arrest, would not have tended to show that, since he could not go by rail, he did not intend to deprive the owner permanently of his property and also to depart from the state.

The record discloses no reversible error, and the order and judgment appealed from are affirmed.

#### NOTE.

Every person is presumed to have intended that which his acts indicate his intention to have been. *People v. Langton*, (Cal.) 7 Pac. Rep. 843.

When the intent is the gist of the crime, the presumption that every sane man contemplates and intends the necessary, natural, and probable consequences of his own acts, though a very important circumstance in making the proof necessary upon this point, is not conclusive, nor alone sufficient to convict, and should be supplemented by other testimony to avoid a reasonable doubt. *People v. Sweeney*, (Mich.) 22 N. W. Rep. 50.

No man is to be punished as a criminal unless his intent is wrong, and such wrong intent must be followed by a wicked act to give it force and effect. If one intends to do what he is conscious the law forbids no other evil intent need be shown. In such case the law infers the intent to defraud from the act. *U. S. v. Houghton*, 14 Fed. Rep. 544.

When the proof shows that an unlawful act was done, the law presumes the intent, and proof of the act being a violation of law is proof of the intent. *U. S. v. Baldrige*, 11 Fed. Rep. 552.

The intent with which a criminal act is committed need not be shown by direct proof, but it may be inferred from what the party does, and also from all the facts and circumstances under which the act complained of was committed, as disclosed by the evidence. *State v. Williams*, (Iowa,) 24 N. W. Rep. 52.

Evidence of the acts and doings of the person accused, of a kindred character to those charged, are admissible to show intent. *U. S. v. Snyder*, 14 Fed. Rep. 554.

On an indictment for the larceny of lost goods, evidence may be admitted to show what the defendant said and did about the property and his possession of it, subsequently to the original finding and taking, for the purpose of proving the intent with which the accused originally took the property into his possession at the time of finding it. *Com. v. Titus*, 116 Mass. 42.

It was held in *Dunaway v. People*, 110 Ill. 333, that where one person shoots at another, and kills a third, that he may be convicted of an assault with intent to kill such third person. The court cite, as to the same effect, *Walker v. State*, 8 Ind. 290; *Callahan v. State*, 21 Ohio St. 306; *Perry v. People*, 14 Ill. 496; and *Vandermark v. People*, 47 Ill. 122.

## SUPREME COURT OF KANSAS.

(35 Kan. 15)

## NOBLE v. BOWMAN and others.

Filed March 5, 1886.

## GARNISHMENT—SURETIES—LIABILITY OF GARNISHEE.

M. owed \$165 either to A. or to N.; and O., in an action against A., claiming that the debt was due to A.; garnished M., and the court ordered M. to pay the money into court. N., however, claimed the money as the creditor of M., and M., not knowing to whom he was liable, and wishing to leave the state, entered into an agreement with A. and N. and B. and others that he should pay the money to B., and that B. should retain the same until the question should be finally decided by a judicial determination whether the money belonged to N. or to A. or to O., and that after such determination B. should pay the money to whom it belonged, and the money was in fact paid to B., and he, as principal, and others, as sureties, executed to M. and A. and N. an obligation to secure the faithful fulfillment of the agreement; and nothing has transpired since to render B. and his sureties liable to an action on the obligation. *Held*, in an action by N. against the obligors on their obligation, that they are not liable; or, in other words, that the obligors are not liable to N. until it is at least settled that the garnishee is not liable in the garnishment proceedings.

## Error from Harvey county.

This was an action brought in the district court of Harvey county, Kansas, on August 26, 1881, by Sarah A. Noble against C. S. Bowman, James H. Anderson, William H. Bean, and B. C. Arnold, upon the following instrument in writing, to-wit:

"*State of Kansas, Harvey County—ss.*: Know all men by these presents that we, the undersigned, are held and firmly bound unto A. B. Noble, Sarah A. Noble, and M. A. Myers in the sum of two hundred dollars. The condition of this obligation is that whereas, in the case of *O. J. M. Borden v. A. B. Noble*, on the docket now in the possession of T. C. CUTLER, J. P., of Newton township, in said county and state, the said M. A. Myers was garnished, and ordered by said justice's court to pay into said court, on or before September 15, 1879, the sum of one hundred and sixty-five dollars, (\$165;) and whereas, the said Sarah A. Noble claims to be the owner of said money, and intends to institute proceedings for a final judicial determination of her claim; and whereas, the said M. A. Myers has delivered to C. S. Bowman said sum of \$165, to be by him held until such final adjudication is had, and until September 15, 1879, and then pay the same over to the person or authority adjudged to be entitled thereto; and whereas, the said C. S. Bowman agrees to pay to Sarah A. Noble annually 12 per cent. interest thereon: Now, therefore, if all these things herein required of the said C. S. Bowman are fully done and performed, then the above obligation to be void; otherwise it shall remain in full force and effect.

"Executed in duplicate this twenty-seventh day of October, 1877.

"C. S. BOWMAN.

"JAS. H. ANDERSON.

"WM. H. BEAN.

"B. C. ARNOLD."

The plaintiff, after giving a copy of the foregoing instrument in writing in her petition, alleged, among other things, that she had instituted legal proceedings in the district court of Harvey county for

the purpose of having the question of the ownership of the aforesaid money determined as between herself and the said O. J. M. Borden, and that in such proceedings it had finally been determined that the money belonged to her, and that she was entitled to the same; and that afterwards she demanded the same of the defendants, but that they refused to pay it to her, or any part thereof. The defendants answered, admitting the execution of the foregoing instrument, and the prosecution of the aforesaid legal proceedings between the plaintiff and Borden; but setting up, in substance, that while the question of the ownership of said money had, in said legal proceedings and in the district court, been determined in favor of the plaintiff, yet that the judgment and decision of the district court had been reversed in the supreme court, and that it was held and decided by the supreme court that the question whether the plaintiff was entitled to said money or not could not be determined in that action, and that since the decision of the supreme court the defendants had paid over the money in controversy to Borden. Before the trial of the present action, the subject-matter of the controversy was assigned by Sarah A. Noble to Louis Noble, and he became the plaintiff in the action. Afterwards the case was tried by the court without a jury, and the court made a general finding in favor of the defendants and against the plaintiff, and rendered judgment accordingly, and to reverse this judgment the plaintiff, as plaintiff in error, now brings the case to this court.

*Green & Shaver*, for plaintiff in error.

*Bowman & Bucher*, for defendants in error.

VALENTINE, J. The motion of the defendants in error to dismiss this petition in error must be overruled, and the judgment of the court below must be affirmed. We shall not discuss the motion, however, but will pass at once to the merits of the case. It appears that M. A. Myers owed \$165, either to A. B. Noble or to Sarah A. Noble, and to which he owed this sum is the main question involved in this case. The question arises as follows: O. J. M. Borden commenced an action against A. B. Noble before a justice of the peace of Harvey county, and garnished Myers as the debtor of A. B. Noble, and Myers answered, and was ordered by the justice of the peace to pay the aforesaid \$165 into the justice's court as a debt due from Myers to A. B. Noble. Mrs. Noble, however, claims this money; and Myers, not knowing to whom it belonged, or to whom he should pay it, or to whom he was bound, and wishing to leave the state, entered into an agreement with the Nobles and the defendants in this action that he should pay it to C. S. Bowman, and that Bowman should retain it until the question should be finally decided by a judicial determination whether the money belonged to Mrs. Noble or to A. B. Noble or to O. J. M. Borden, the plaintiff in the garnishment proceedings. The money was in fact paid to Bowman, and he, as prin-

cipal, and James H. Anderson, William H. Bean, and B. C. Arnold, as sureties, executed to Myers and the Nobles the obligation sued on in this action, to insure the faithful fulfillment of the foregoing agreement. Borden was not a party to this agreement or to the obligation aforesaid, nor did he agree to release Myers as garnishee, or to look to the fund in Bowman's hands as security for his claim against A. B. Noble; and, of course, unless Borden's claim against A. B. Noble has been satisfied, or Myers in some way released by Borden, Myers is still liable to Borden as garnishee, if he ever was so liable, and nothing has been shown in this case that would in any manner have the slightest tendency to release Myers. It is true, the defendants offered to prove that Bowman paid the money into the justice's court for Borden, but the plaintiff objected, and the evidence was excluded by the court. It is also true that the plaintiff commenced an action in the district court of Harvey county against Borden and others, to have the question determined as to whom the fund in Bowman's hands belonged or should be paid, and the district court decided that it belonged to Mrs. Noble; but it is also admitted that that case was brought to the supreme court, and that the judgment of the district court was reversed, (*Borden v. Noble*, 26 Kan. 599;) and what has become of that case since it was decided in the supreme court, we are not informed; and no party now makes any claim under it; and there is no claim now that any final adjudication with regard to the money in Bowman's hands, or with regard to the liability of Myers to Borden or to A. B. Noble or to Mrs. Noble for that amount has ever been had,—therefore, so far as anything is shown in this case, Bowman still has the possession of the aforesaid money; Myers is still liable to Borden as garnishee for that amount, if he ever was so liable; and the *status* of the parties, and their relations towards each other, still remain precisely the same as they were on the twenty-seventh day of October, 1877, when the obligation sued on in this action was first executed, and on the day when the fund now in litigation was first paid by Myers to Bowman. We therefore think it follows that the rights and interests of the parties still remain the same as they were on the first day.

The obligation sued on in this action was executed by the present defendants, as obligors, to Myers and A. B. Noble and Mrs. Noble, as obligees, to secure the payment of the fund deposited by Myers with Bowman to the person to whom it might finally be decided to belong; and Myers certainly has as much right to claim that the fund shall be applied in such a manner as best to protect his rights and interests as either A. B. Noble or Mrs. Noble has to claim that the money shall be paid to him or her; and so long as Myers is liable to Borden as garnishee, and presumably he is still liable, this fund, which he placed in Bowman's hands, should not be paid to either A. B. Noble or Mrs. Noble until it shall be finally settled or determined in some manner that Myers is no longer bound to pay the same

to Borden, or to pay the same into the justice's court for the benefit of Borden. Such a settlement or determination has never yet been had. Indeed, as before stated, nothing has transpired since the execution of the obligation, and since the payment of the money by Myers to Bowman, that would render the present defendants, the obligors mentioned in the bond sued on in this action, liable; and if they are now liable for any reason, then they were liable for the same reason at the very first instant when they executed the bond. Now, it cannot be true that they intended to execute a bond which would render them liable to be sued just as soon as it was executed. It can scarcely be supposed that they intended, by signing the bond, to give Mrs. Noble an immediate cause of action against them upon the bond for the \$165; but if they are now liable, upon the facts of this case, then they must have been liable as soon as they executed the bond, which cannot be the case. Before the defendants can be held liable on the bond, it must be determined in some manner conclusively as against Borden, and in favor of Myers, that Myers has never been liable in the garnishment proceedings of Borden, or that he has been released therefrom. Such a determination or release, judicial or otherwise, has never been had; and the decision in this present action could not amount to such a determination or release, in whosoever favor it might be rendered; for, in order that the decision in this present action should be such a determination or release, all the obligees of the bond, as well as Borden, should be parties to the action. None of them can be bound by the decision or the judgment rendered in this action unless they have been made parties thereto, which has not been done. Neither Myers nor A. B. Noble nor Borden has been made a party to this action. So far as is shown in this case, if Bowman should be required to pay the amount in controversy to Mrs. Noble, or to her assignee, Louis Noble, the present plaintiff in this action, the defendants might again be required to pay the amount to one of the other obligees of the bond. They might, indeed, have to pay it to Myers, if Myers should finally be held to be liable in the garnishment proceedings. We shall assume that Borden could not maintain an action on the bond for the recovery of the fund in Bowman's hands, for he was not a party to the bond, and had nothing to do with it; but still Borden may maintain an action against Myers, as garnishee, for the amount, and then Myers, as one of the obligees of the bond, might maintain an action against the defendants for the same. In our opinion, so long as Myers is liable as garnishee to Borden, no cause of action can accrue in favor of either A. B. Noble or Mrs. Noble, or her assignee, Louis Noble, for the fund mentioned in the bond.

We think the judgment of the court below is correct, and it will be affirmed.

(All the justices concurring.)

(34 Kan. 755)

## TRICKETT v. MOORE and another.

Filed March 5, 1886.

## GARNISHMENT—DEBT DUE PARTNERSHIP GARNISHED AS DEBT DUE PARTNER.

What is due a partnership cannot be subjected to garnishment as a credit due one of the firm. In an action against one of the firm, a debtor to the partnership cannot be made a garnishee. Such debtor owes nothing to any one member of the firm.

## Error from Johnson county.

On May 5, 1883, J. T. Trickett brought his action, in a justice's court of Johnson county, against Jonathan Harris, and in that action had a garnishment notice served upon F. M. Moore and J. R. Moore requiring them to answer touching any property in their hands or under their control, or indebtedness from them to said Harris. The defendants answered that they had no property belonging to Harris under their control, and that they were not indebted to him in any sum. Subsequently the original cause came on for trial, and plaintiff recovered judgment against Harris for the sum of \$200, and \$13 costs. On May 15, 1883, J. T. Trickett commenced his action against F. M. Moore and J. R. Moore, defendants, setting forth in his bill of particulars that the answer of said defendants on the garnishment proceedings in the action of plaintiff against Jonathan Harris was not satisfactory and was untrue. Plaintiff also set forth in his bill of particulars that on March 30, 1881, the defendants executed and delivered to Adam Rankin their promissory note for \$200, payable January 1, 1882; that Rankin, for a valuable consideration, indorsed and transferred the note to Jonathan Harris, and that at the date of the garnishment he was the legal holder and owner of the same; and that said Harris continued to be the *bona fide* holder thereof. The bill of particulars further set forth that neither Adam Rankin, nor any of the defendants, had paid the note, or any part thereof; that the note was due, together with interest,—wherefore the plaintiff demanded judgment against the defendants for the sum of \$213, and costs of suit. Plaintiff recovered judgment before the justice of the peace against the defendants for \$200, and interest and costs, and thereupon the action was appealed by the defendants to the district court. Trial had at the March term of court for 1884. Judgment was rendered in favor of the defendants. Plaintiff excepted and brings the case here.

*E. B. Gill and J. W. Parker*, for plaintiff in error.

*Burris & Little*, for defendants in error.

HORTON, C. J. Various questions are discussed at length in the briefs furnished upon the hearing of this case, but only one question need be noticed. This disposes of the case. The action in which the garnishment summons issued was entitled "*J. T. Trickett v. Jonathan Harris*." The affidavit for garnishment alleged that Adam

Rankin, J. R. Moore, and F. M. Moore are indebted to Jonathan Harris, and that Jonathan Harris is justly indebted to the plaintiff in the sum of \$200 over and above all legal set-off. Judgment was rendered against Jonathan Harris for \$200, with interest and costs. J. R. Moore and F. M. Moore, in their answer as garnishees, stated that they gave Adam Rankin a note for \$200, which went into the Harris Bank. Adam Rankin testified that in March, 1881, J. R. Moore and F. M. Moore gave him their note for \$200, payable January 1, 1882; that three or four months before it came due he borrowed \$100 of Jonathan Harris & Co. and gave his note for it, and deposited the Moore note with them as collateral security; that afterwards, and before it came due, he got \$94 more out of the bank on overdrafts against the Moore note; that he had never paid the note to the Harris Bank or the overdrafts. J. H. Hare testified that in 1884 he was the book-keeper in the bank of Jonathan Harris & Co.; that the Moore note to Rankin was turned over to J. Harris & Co. as collateral security. J. R. Moore testified that the \$200 note which he and his brother gave to Adam Rankin was in J. Harris & Co.'s bank on December 31, 1881; and that on that day he went to Harris' bank, and asked William H. Smith if he held his note to Rankin for \$200. He answered that he held it for collection. A. Smith Devenney testified that in December, 1881, William H. Smith was one of the partners in the Harris Bank. The case before us was tried to the court, without a jury, and a general finding was made for the defendants. Therefore the finding is in favor of the defendants for all the facts necessary to constitute their defense. *Knaggs v. Mastin*, 9 Kan. 532; *Bix'y v. Bailey*, 11 Kan. 359. There was no demand for special findings.

In the bill of particulars filed by the plaintiff against the defendants it is alleged that the defendants are debtors of Jonathan Harris. The question therefore arises, can the defendants be held, as garnishees, as the debtors of Jonathan Harris alone, when the record shows that, if they are the debtors of any one, they are the debtors of Jonathan Harris & Co., a firm composed of Jonathan Harris and William H. Smith? The great weight of authority is that what is due a partnership cannot be subject to garnishment as a credit due one of the firm. Therefore in a suit against him a debtor to a partnership cannot be made a garnishee. Such debtor owes nothing to any one member of the firm. Drake says:

"The attachment of a debt due to a copartnership, in an action against one of the partners, is justly distinguishable from the seizure, on attachment or execution, of tangible effects of the firm for the same purpose. Hence we find the supreme court of Alabama holding that partnership property may be sold to pay the debt of one partner, but that a debt due a firm cannot be taken by garnishment for that purpose. The reason assigned is that in the case of sale the property is not removed, and cannot be appropriated until all liens upon it growing out of or relating to the partnership are discharged; while in the other case, judgment against the garnishee, if acquiesced in, changes the right

of property, and divests the copartner's title to the property attached, which cannot be done so long as the partnership accounts remain unsettled or its debts unpaid. *Winston v. Ewing*, 1 Ala. 129." Sections 567-571.

In an action against G. & G., the garnishee answered that he was indebted to G. & L., one of the defendants being a member of both firms. Justice STORY, in deciding against the liability of the garnishee, observed:

"In order to adjudge the trustee responsible in this action, it must be decided that the funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof that the principal debtor is interested in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable as well as legal rights than the partner himself has. The general rule undoubtedly is that the interest of each partner in partnership funds is only what remains after the partnership accounts are taken, and unless, upon such an account, the partner be a creditor of the fund, he is entitled to nothing; and if the partnership be insolvent, the same effect follows." *Lyndon v. Gorham*, 1 Gall. 367; *Upham v. Naylor*, 9 Mass. 490.

The position taken in the decisions cited is supported by the courts of New Hampshire, Vermont, Rhode Island, New York, Maryland, Louisiana, Mississippi, Tennessee, Ohio, and Missouri. In Maine, Pennsylvania, and South Carolina the contrary doctrine prevails. For a further discussion of this subject, see *Waples, Attachm. & Garnishment*, 204; *Williams v. Gage*, 49 Miss. 777; *Sheedy v. Second Nat. Bank*, 62 Mo. 17; *Singer v. Townsend*, 53 Wis. 126; S. C. 10 N. W. Rep. 365; *Same v. Same*, 53 Wis. 226; S. C. 10 N. W. Rep. 365; *Markham v. Gehan*, 42 Mich. 74; S. C. 3 N. W. Rep. 262; *Sweet v. Read*, 12 R. I. 121; *Carr v. Catlin*, 13 Kan. 393; *Hershfield v. Clafin*, 25 Kan. 166.

Counsel for plaintiff, in their oral argument, contended that the proposition that a debt due a partnership cannot be taken, by garnishment, to pay the individual debt of one member of the firm, was not raised in the trial court; and they also assert that the firm of Jonathan Harris & Co. was composed solely of Jonathan Harris. The record does not sustain the assertion. It is clearly established that at least two partners composed the firm of Jonathan Harris & Co.,—Jonathan Harris and William H. Smith. There was no evidence presented showing that William H. Smith had ever withdrawn from the firm, or that at any time the firm of Jonathan Harris & Co. consisted solely of Jonathan Harris.

The judgment of the district court must be affirmed.

(All the justices concurring.)

(34 Kan. 746)

**MANN and another v. SECOND NAT. BANK OF SPRINGFIELD, OHIO.**

Filed March 5, 1886.

**1. CORPORATION—ACTION AGAINST—EVIDENCE—PLEADING.**

Under the pleadings and evidence in this case, *held*, that it was sufficiently shown that the Second National Bank of Springfield, Ohio, was a corporation.

**2. PROMISSORY NOTE—INDORSEMENT.**

Also, under the pleadings and evidence, *held*, that the indorsement of the note sued on in this action was sufficient to cut off all outstanding and existing equities against the note of which the purchaser at the time of the purchase and indorsement did not have notice; and *further held*, that a negotiable note, executed in terms to "A. W., president," A. W. being the president of the Champion Machine Company, but intended to be executed to and to belong to the Champion Machine Company, and it did in fact belong to such company; and such note is afterwards, but before maturity, sold to an innocent purchaser, and indorsed by A. W. to such purchaser in the following words: "The Champion Machine Company, by A. W., president,"—such indorsement will transfer the note freed from all equities or infirmities of which the purchaser had no notice.

**3. CORPORATION—CONSTRUCTIVE NOTICE.**

A corporation should be held to have constructive notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents by the actual notice of such other facts as would naturally put the officer or agent upon inquiry; and therefore *held*, where none of the officers or agents of a bank had any actual notice of any infirmity of a note purchased by the bank, but one of the directors who was also a member of the discount committee of the bank was the president and general manager of another corporation, one of whose agents, not the president and general manager, had actual notice of an infirmity of the note such as would require this agent's own corporation to take constructive notice of such infirmity, the bank may nevertheless be considered as an innocent purchaser of the note without notice of any infirmity affecting it, notwithstanding the fact that the other corporation had constructive notice through its agent of such infirmity.<sup>1</sup>

**4. PROMISSORY NOTE—POSSESSION AS EVIDENCE OF TITLE.**

The mere possession of a negotiable instrument payable to order, and properly indorsed, is *prima facie* evidence that the holder is the owner thereof; that he acquired the same in good faith, for full value, in the usual course of business, before maturity, without notice of any circumstance that would impeach its validity; and that he is entitled to recover upon it its full face value as against any of the antecedent parties; and where the maker of such an instrument, so indorsed and held, claims that the holder of the instrument is not a holder for value, it devolves upon the maker to prove the same. Mere evidence that at the time when such an instrument was discounted by a bank, the bank merely gave credit for the amount of the instrument to the person selling the same, who had an account with the bank, without showing the state of the account at that, or at any other time, will not, of itself and alone, prove that the bank was not a purchaser for value.

**5. BANKS AND BANKING—ACCOUNT—EVIDENCE.**

It is not competent to prove the condition of a long account between a bank and one of its customers, and virtually the contents of the books of the bank, by the oral testimony of the cashier of the bank, where it is not shown that the cashier is the book-keeper, or that the books are kept under his supervision, or that he has any knowledge of such books.

**Error from Doniphan county.**

*W. D. Webb and T. W. Heatley*, for plaintiffs in error  
*Ryan & Wood*, for defendant in error.

<sup>1</sup>See note at end of case.

VALENTINE, J. This was an action brought originally before a justice of the peace of Doniphan county, Kansas, by the Second National Bank of Springfield, Ohio, against Lawson Mann and John D. Round, on a promissory note for \$143, executed by Mann and Round to Amos Whitely, president, and indorsed and transferred to the bank. After trial and judgment in the justice's court the case was appealed to the district court, where it was again tried, and judgment rendered in favor of the plaintiff and against the defendants for the amount of the note, with interest and costs, and to reverse this judgment the defendants, as plaintiffs in error, brought the case to this court. In this court the judgment of the court below was reversed, and the cause remanded for a new trial. *Mann v. National Bank*, 30 Kan. 412; S. C. 1 Pac. Rep. 579. After the return of the case to the district court it was again tried, and judgment was again rendered in favor of the plaintiff and against the defendants for the amount of the note, with interest and costs, and the defendants, as plaintiffs in error, again bring the case to this court for review.

The first point now presented by the plaintiffs in error (defendants below) is that no proof was at any time introduced showing that the plaintiff below (defendant in error) was or is a corporation. Now, probably it makes no difference whether any such proof was introduced or not; but we think there was sufficient. The plaintiff alleged in its pleadings that it was a corporation, and the defendants have never denied the same. They raised no question in the district court with regard to the necessity for proof upon this subject, or the lack of proof, and have raised the question for the first time only in the submission of their case to this court. We think the proof upon this subject was sufficient. The evidence in the court below, as well as the pleadings, tended to show that the plaintiff was a corporation. The evidence tended to show that the plaintiff was a national bank, doing a banking business at Springfield, Ohio, with all the proper officers for that purpose, including a president, board of directors, cashier, discount committee, etc., and, presumably, it must be a national bank, for under the laws of congress no persons, or combination of persons, other than a national bank, have any right to use any such name. Rev. St. U. S. § 5243.

The plaintiffs in error (defendants below) further claim that there was no such indorsement or transfer of the note as would convey any interest in the note to the defendant in error, (plaintiff below;) and that even if there was, still that such indorsement or transfer was so irregular and informal that it would not cut off any outstanding equities existing in favor of the defendants below and against the original holders of the note. We shall assume that there were outstanding equities existing against the note, for the evidence tended to prove the same; or, to be more explicit, we shall assume that there was a failure or partial failure of the consideration for the note; and yet we think that this claim of the defendants below is not good. The

plaintiff below, in its original bill of particulars, alleged, among other things, that the note sued on was made payable to the order of "Amos Whitely, president," and gave a full copy of the note; and further alleged "that said Amos Whitely indorsed and transferred said note for a valuable consideration, before maturity, to said plaintiff." The defendants did not, by their answer or otherwise, deny any of these allegations, (and in this connection, see section 84, Justice's Code;) but, on the contrary, they admitted in their answer the execution of the note, and the alleged indorsement thereof, and alleged, among other things, as follows:

"That the note sued on in this action was given to the said Amos Whitely as president of the Champion Machine Company of Springfield, Ohio, which said company was then and now is a corporation duly organized and doing business under and by virtue of the laws of the state of Ohio; and that it was at the time it was so given by these defendants the property of and belonged to the said Champion Machine Company, and was not the property of the said Amos Whitely, and never has been his note or property, although taken in his name and made payable to his order."

The defendants also alleged in their answer that the note "*was indorsed to the plaintiff* as collateral security for the said Champion Machine Company to draw against at said bank." The case was tried in the court below upon the theory that the note originally belonged to the Champion Machine Company, as alleged in the defendants' answer; and it was shown by the evidence to have been indorsed and transferred to the bank by the use of the following words, to-wit: "The Champion Machine Company, by Amos Whitely, president." We think this indorsement transferred the note to the bank freed from all outstanding equities against it of which the bank did not have notice. The note, on its face, appeared to belong to "Amos Whitely, president." It belonged in fact to the Champion Machine Company. It was indorsed by the Champion Machine Company, and was also indorsed for such company by Amos Whitely, president. This, we think, was a sufficient indorsement, both as against the company and Whitely, to convey title, and we think it conveyed title freed from equities. Any other ruling would be the sacrifice of substance to form. *Pease v. Dwight*, 6 How. 190, 198. See further upon this subject the decision in this case when it was formerly in this court. *Mann v. National Bank*, 30 Kan. 412, 418; S. C. 1 Pac. Rep. 579.

It is further claimed by the defendants below that the bank at the time when the note was discounted and afterwards had constructive notice of the failure of the consideration of the note, and therefore that the bank did not obtain title to the note freed from the equities existing in favor of the makers thereof; and this is claimed for the following reasons: It is claimed that Amos Whitely had notice of such failure of consideration; that he was a director and a member of the discount committee of the bank; and therefore that the bank must

also be held to have had such notice. In the argument by counsel for the defendants below no distinction seems to have been recognized with regard to the kind of notice which Whitely may have had,—whether it was actual or constructive, or whether it was obtained in connection with the business of the bank, or in some other manner. While it is true that Whitely was a director and a member of the discount committee of the bank, yet he had no actual notice of the failure of the consideration of the note, or of any other infirmity affecting the note, and neither had any other agent or officer of the bank any such actual notice. The facts with regard to this subject are as follows: J. P. Quigley was the agent of the Champion Machine Company, at St. Joseph, Missouri, where the note was executed, and had actual notice of the consideration for the note, and of the alleged failure of such consideration. He transmitted the note to Whitely, at Springfield, Ohio, who was the president and general manager of the Champion Machine Company. Whitely afterwards indorsed the note as aforesaid, and then Edward P. Christie, the cashier of the Champion Machine Company, took the note to the bank before due, and sold it to the bank, J. G. Benallack, the cashier of the bank, acting at the time as the agent of the bank in the purchase of the note. Prior to that time Benallack had been instructed by the president of the bank to discount all paper presented by the Champion Machine Company for that purpose. The claim, then, of the defendants, in the light of the facts of the case, is as follows: J. P. Quigley, the agent of the Champion Machine Company, at St. Joseph, Missouri, where the note was executed, had actual knowledge of the failure of the consideration of the note, and therefore Amos Whitely, the president and general manager of the company, who resided in Ohio, must also be held to have had sufficient notice, although he had no actual notice, but only constructive notice; and that as he had constructive notice as president and general manager of the Champion Machine Company, he must also be held to have had such notice in the capacity of director and member of the discount committee of the bank, and therefore that the bank itself must be considered as having had such notice. In other words, the bank must be held to have had constructive notice of the infirmity of the note, not because it or any of its officers or agents had actual notice thereof, or actual notice of any fact which might put them upon inquiry, but because one of its officers was a member of another corporation which had an agent who had actual notice of such infirmity. We think this is carrying the doctrine of constructive notice too far. We think a corporation should be held to have constructive notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents by the actual notice of such other facts as would naturally put the officer or agent upon inquiry. Why should a cor-

poration be required to take notice of matters or things concerning which not one of its officers or agents has any actual notice? How could its officers or agents communicate to the corporation notice of matters or things of which they themselves have no actual notice? And how, in the present case, could Whitely have communicated to his bank the fact of the infirmity of the note in suit, when he did not possess the slightest actual knowledge or notice that such infirmity existed?

The defendants below further claim that the court below erred in excluding certain evidence tending to show that the plaintiff did not at any time pay any valuable consideration for the note, and has never given to the Champion Machine Company anything for the note other than a mere credit for the amount of the note. Preliminarily, we would state that the mere possession of a negotiable instrument, payable to order and properly indorsed, is *prima facie* evidence that the holder is the owner thereof; that he acquired the same in good faith, for full value, in the usual course of business, before maturity, without notice of any circumstance that would impeach its validity; and that he is entitled to recover upon it its full face value, as against any of the antecedent parties. Daniel, Neg. Inst. § 812; *Ecton v. Harlan*, 20 Kan. 452; *Lyon v. Martin*, 31 Kan. 411; S. C. 2 Pac. Rep. 790; *Rahm v. Bridge Manuf'y*, 16 Kan. 530. Where a maker of such an instrument, so indorsed and held, claims that the holder of the instrument is not a holder for value, it devolves upon the maker to prove the same. We think no such evidence was introduced in this case. Nothing that would overturn the *prima facie* case made out by the pleadings and evidence of the plaintiff, and nothing that would shift the burden of proof back from the defendants to the plaintiff. No fraud or illegality in the original inception of the note was shown or claimed, nor anything that would defeat the plaintiff's action, except the aforesaid failure of consideration, together with the supposed notice to the bank, the supposed irregularity in the indorsement of the note, and the alleged failure on the part of the bank to pay value for the note.

The principal facts concerning the note are as follows: Near the last of June, 1881, the defendants went to St. Joseph, Missouri, and purchased from James P. Quigley, the agent of the Champion Machine Company, a "Champion Harvester and Cord Binder," and agreed to pay therefor the sum of \$275, and the machine was immediately delivered to the defendants in Doniphan county, Kansas, where they resided. They tried the machine two days, and then gave two notes to the Champion Machine Company in payment for the machine, and took from the company a written warranty that the machine should do good work, etc. The defendants continued to operate the machine for about one week longer, and then went back to St. Joseph, Missouri, and executed the note sued on and one other note in lieu of the two notes originally given by them to the Cham-

pion Machine Company. They further operated the machine, but before their harvesting was fully completed some part of the machine was broken, and they have never used it since. They retained the possession of the machine, however, and kept it on the farm of one of the defendants. After they gave the note sued on it was sent to Ohio, to Amos Whitely, as aforesaid, and on December 14, 1881, it was transferred to the plaintiff bank as aforesaid, and immediately afterwards was sent by the bank to the State Savings Bank of St. Joseph, Missouri, for collection, and the savings bank immediately gave notice to the defendants. The note was to become due on January 1, 1882. The defendants then went to Quigley and demanded the note, and offered to return the machine, but he stated that he had nothing to do with the note, and that he did not want the machine. The defendants testified that prior to this time, and some time in September, October, or November, they offered to return the machine to Quigley; but he testified that they never offered to return the machine until the latter part of December, after the note had been transferred to the bank, and just before it became due. The note was, of course, valid at its inception, and the plaintiff may recover unless the evidence of the defendants excluded by the court was competent as tending to show that the plaintiff did not pay value for the note. The plaintiff, after making out a *prima facie* case in the court below, attempted to show affirmatively and in fact, by other evidence, that it had paid full value for the note; but the defendants objected to the evidence, and the court excluded the same upon the ground that it was an attempt to prove the contents of the books of the bank, or conclusions derived from such books, without producing the books themselves. The trial was had in Doniphan county, Kansas, and the books were in Springfield, Ohio, and of course could not be produced. After this the defendants attempted to prove, by the same kind of evidence as that offered by the plaintiff, that the plaintiff did not pay value for the note, but gave only a credit to the Champion Machine Company therefor, and that the Champion Machine Company has never drawn out of the bank any portion of such credit. The court also excluded this evidence, and for the same reason that it excluded the plaintiff's evidence. We think the evidence was properly excluded. This evidence of the defendants was in the deposition of J. G. Benallack, who was at the time when the bank purchased the note the cashier of the bank. It was not shown that Benallack himself kept the books, or that they were kept under his direction or supervision, or that he knew that they were kept correctly, or indeed, that he had any knowledge of them at all. Probably Benallack had but little knowledge of the books, as he was not the book-keeper, but a man by the name of Campbell was. If we should assume that the bank did not pay the value of the note at the time it was discounted, but simply gave a credit to the Champion Machine Company therefor, still there would

be nothing to show whether at that time the bank owed the Champion Machine Company or the machine company owed the bank. The machine company, for anything that appears in the case, may have owed the bank more than \$143 at the time the note was discounted, and if it did, the bank would have obtained the note unaffected by the equities existing between the antecedent parties of which it had no notice, (*Draper v. Cowles*, 27 Kan. 484,) and the Champion Machine Company may have continued to owe the bank ever since. The account between the Champion Machine Company and the bank seems to have been a very long one, and probably contained a vast number of items, and nothing appears in the record tending to show how this account stood at any time. We think it is probable that the court might very properly have admitted some of the evidence, both of the plaintiff and the defendants, upon this subject which it excluded; but still we do not think that the court committed any material error in excluding any of the evidence of the defendants which it did exclude.

We have carefully examined all the rulings of the court below referred to by counsel, and, not finding any material error in any of them, the judgment of the court below will be affirmed.

(All the justices concurring.)

#### NOTE.

The holder of negotiable paper, taking it for a good consideration, in the usual course of business, without knowledge of facts impeaching its validity, holds it by a good title; and it will not be enough to defeat his recovery to show that he took it under circumstances that might tend to excite suspicion. *Farrell v. Lovett*, 68 Me. 326.

One who innocently acquires negotiable paper is not chargeable with notice of equities, knowledge of which came to his agent through a transaction outside of his agency. *Kauffman v. Robey*, 60 Tex. 308.

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(34 Kan. 740)

### GREEN v. GREEN and others.

Filed March 8, 1886.

#### HUSBAND AND WIFE—CONVEYANCE BY WIFE IN FRAUD OF HUSBAND'S MARITAL RIGHTS.

Where a widow who was, at the time of her engagement to be married, the owner of 160 acres of land in this state, which was all of her property, and her sole means of support, induced one G., a cripple, possessed of only a few hundred dollars, to make a matrimonial engagement with her, and marry her on her verbal promise and agreement that the farm was her own, and that its proceeds should go to their support after they were married so long as they lived; and G., who was loath to make the marriage engagement, or to marry, until assured of some support after marriage, relying upon said verbal promise and agreement, married such widow, and after the marriage lived with her as his wife, furnishing rooms, and buying food and clothing for the family, and also for the children of his wife by her former marriage, and permitting her to use \$100 of his own money to pay a mortgage upon the farm, and the wife, about 18 months after the marriage, delivered to her daughter by her former marriage deeds of her farm, which deeds were signed and executed by her for the consideration of love and affection only, and without the knowledge or consent of G., just on the eve of her marriage, held, that the deeds are in fraud of the rights of G., and that G. may maintain an action, during

the life of his wife, to set the same aside, and have them declared invalid. *Hafer v. Hafer*, 33 Kan. 449; S. C. 6 Pac. Rep. 587; *Busenbark v. Busenbark*, 33 Kan. 572; S. C. 7 Pac. Rep. 245.<sup>1</sup>

Error from Shawnee county.

*Oliver Green*, for plaintiff in error.

*Stumbaugh, Arnold & Hilton*, for defendants in error.

HORTON, C. J. Harriet F. Wilcox, being the owner of certain real estate, and about to be married to Oliver Green, signed and executed deeds of all of her real estate to her children the day before her marriage. The deeds were made without the knowledge or consent of her intended husband, and for no other consideration than love and affection. The grantees of Harriet F. Wilcox, now Harriet F. Green, executed the property to James H. Easterday, who, at the time, had knowledge of all the circumstances attending the execution of the deeds to them. Oliver Green, the husband, attempts to set aside these deeds, alleging that the same are fraudulent as to him. The defendant James H. Easterday demurred to the petition of plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being sustained by the court, the plaintiff now brings the case here for review.

On the part of the defendants it is claimed that the sole question for our consideration is whether a voluntary conveyance of all her real estate, executed by a woman on the eve of marriage, without the knowledge or consent of her intended husband, is fraudulent as to his marital rights. If this were the only question in the case, we might, perhaps, repeat what is said in *Butler v. Butler*, 21 Kan. 525, that "it may be doubted whether it is the law in Kansas to-day that such a conveyance is fraudulent." Under the allegations of the petition, however, a very different question is presented. The petition, among other things, alleges that in August, 1882, Oliver Green and Harriet F. Wilcox were engaged to be married; that at the time of the engagement Harriet F. was the owner of a farm of 160 acres, in Shawnee county in this state; that the farm was all the property belonging to her; that Oliver Green was possessed of only a few hundred dollars in cash; that Harriet F. Wilcox induced Oliver Green to make the matrimonial engagement with her and to marry her, representing to him, at the time of the engagement, that the farm belonged to her, and that its proceeds should go to their support after they were married so long as they lived, and then to her children; that the proceeds of the farm were ample to keep both parties; that Green was loath to make any marriage engagement, or to marry Harriet F., without some assurance of support, as he was a cripple, having lost his right forearm; that on account of these promises and other similar representations of Harriet F., and relying thereon, Green married her, August 31, 1882; that the parties then

<sup>1</sup>See note at end of case.

proceeded to live together as husband and wife, in the city of Topeka; that plaintiff furnished rooms, and bought food and clothing for his family, also for a single daughter of his wife, and for her widowed daughter and two little children; that the plaintiff received none of the proceeds of the farm, although his wife controlled and rented the same in her own name; that at the time of the marriage there was a mortgage of \$100 upon the farm, and, with money belonging to the plaintiff, his wife paid off the mortgage February 14, 1883; that subsequently, without any reason or provocation, she deserted her home and husband; that on August 30, 1882, on the eve of her marriage, Harriet F. Wilcox, without the knowledge or consent of plaintiff, signed and executed deeds purporting to convey her farm—being all of her own means of support—to her daughters by a former marriage, without other consideration than love and affection; that these deeds were not delivered until March 5, 1884,—long after the marriage. They were then recorded in the office of the register of deeds of Shawnee county.

For the purposes of this case all the allegations of the petition must be taken as true. Therefore we must assume there was a verbal antenuptial contract existing between Oliver Green and Harriet F. Wilcox at the time of their marriage; that the marriage was consummated by Green on account of his reliance upon the antenuptial contract; and that Harriet F. Wilcox, now Green, has been guilty of misrepresentation, deception, and actual fraud towards Oliver Green before and after her marriage.

The question is whether under all these circumstances, the deeds delivered subsequent to the marriage can be set aside as fraudulent to the husband. We decided in *Hafer v. Hafer*, 33 Kan. 449, S. C. 6 Pac. Rep. 537, that "the statutes of this state recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and that an antenuptial contract, providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced;" and we further decided that "marriage is a good and sufficient consideration to sustain an antenuptial contract." Section 6 of chapter 43, Comp. Laws 1879, of the statute for the prevention of frauds and perjuries, provides:

"No action shall be brought \* \* \* to charge any person upon any agreement made upon consideration of marriage, \* \* \* unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

But for this statute we suppose it would be conceded that the antenuptial contract might be enforced, or, at least that the deeds of Harriet F. Green, *nee* Wilcox, attempting to convey, without considera-

tion, all of her real estate, so as to deprive herself of the power of carrying out her promises and contracts, would be invalid, as a fraud upon her husband. "It is generally true that representations on which a marriage is had are upheld in equity on the ground of fraud; and where there is no fraud, the rule does not apply. \* \* \* Actual fraud will, in equity, break through any law that is not penal or political in character; through any law, written or unwritten, which goes only to the rights of the parties, and has no public object to serve apart from doing justice between man and man." 1 Reed, St. Frauds, § 175. See, also, *Eldredge v. Jenkins*, 3 Story, 181; *Durham v. Taylor*, 29 Ga. 166.

In *Glass v. Hulbert*, 102 Mass. 24, it was said:

"The marriage, although not regarded as a part performance of the agreement for marriage settlements, is such an irretrievable change of situation that if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other parties are held to make good the agreement, and not permitted to defeat it by pleading the statute."

In *Petty v. Petty*, 4 B. Mon. 215, the wife, in her petition, charged that her husband, being much the elder, and in good circumstances, as an inducement to the contract of marriage, and as a means of providing for her support in the event of his death, before their marriage promised her that if she would marry him he would immediately after the marriage make a deed of settlement, etc. A few days after the marriage her husband disclosed to her for the first time that he had been induced, by certain persons, to make over his property before he married. The court said, in passing upon the case, that "the wife has been fraudulently deprived of the right of dower by the deeds in question. To that extent, at least, of this interest, if no further, their execution was a fraud upon her, and ought not to stand."

In *Southerland v. Administrator*, 5 Bush, 591, it is held that, "as between parties, an oral antenuptial contract that neither party should claim or interfere with the property of the other, any more than if they had not married, is unquestionable, and also as to all claiming as volunteers under them."

In this case, in addition to the oral antenuptial contract between the parties, the deed, although executed just upon the eve of marriage, was not delivered until long after; and as a deed takes effect only from the time of its delivery, therefore it had no force until after the marriage. *Railroad Co. v. Owen*, 8 Kan. 409, 419; *Babbitt v. Johnson*, 15 Kan. 252; *Mitchell v. Skinner*, 17 Kan. 565; *Harrison v. Andrews*, 18 Kan. 535.

In *Busenbark v. Busenbark*, 33 Kan. 572, S. C. 7 Pac. Rep. 245, we held that "while the wife's right and interest in the real estate of her husband, not occupied by the family as a homestead, is inchoate and uncertain, yet it possesses an element of property to such a degree that she may maintain an action, during the life of her husband, to prevent its wrongful alienation or disposition under fraudulent

judgments procured and consented to by the husband, with the object and for the purpose of defeating the wife's right."

Upon the well-established doctrine that fraud takes any case out of the statute of frauds, and the principle declared in *Busenbark v. Busenbark*, we conclude that the deeds in controversy are in fraud of the rights of plaintiff, and that he is entitled to have them set aside. See, also, *Youngs v. Carter*, 10 Hun, 194; *Petty v. Petty*, *supra*; *Kelly v. McGrath*, 70 Ala. 75; *Freeman v. Hartman*, 45 Ill. 57.

The defendant James H. Easterday, having purchased his title with full knowledge of plaintiff's rights, can have no better title than his grantors.

The judgment of the district court will be reversed, and the cause remanded, with directions to overrule the demurrer.

(All the justices concurring.)

#### NOTE.

In *Hamilton v. Smith*, (Iowa,) 10 N. W. Rep. 276, where a husband, four days before his marriage, conveyed certain land to his children by a former wife, reserving a life-interest in himself, and immediately after his marriage made a will of other property inferably in favor of his wife, it was held that such conveyance would not be regarded as in fraud of the rights of the wife.

A secret conveyance by a woman of her property to an insolvent for an inadequate consideration, pending negotiations for her marriage, and three days before marriage, is fraudulent as to the husband. *Hall v. Carmichael*, 8 Baxt. 211.

## SUPREME COURT OF KANSAS.

(35 Kan. 62)

## DYAL and another v. CITY OF TOPEKA.

Filed March 5, 1886.

## 1. ERROR—CASE MADE—REVIEW OF RULING ON MOTION FOR NEW TRIAL.

Where no case was made for the supreme court, nor any extension of time given for that purpose within three days after judgment was rendered, and the case was not brought to the supreme court within one year after the judgment was rendered, the supreme court cannot review such judgment, or any ruling involved therein or made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as, for instance, a subsequent ruling on a motion for a new trial.

## 2. SAME—ERROR IN OVERRULING MOTION.

And in such a case, where it is not shown that the motion for the new trial was filed within three days after the judgment was rendered, nor shown upon what ground, if any, the motion for the new trial was made, the supreme court cannot say that the court below erred in overruling the motion for the new trial.

Error from Shawnee county.

*James J. Hitt*, for plaintiffs in error.

*J. H. Moss* and *W. A. S. Bird*, for defendant in error.

VALENTINE, J. This was an action, brought in the district court of Shawnee county by John J. Dyal and Seward E. Dyal against the city of Topeka, to perpetually enjoin the defendant and its officers, agents, and employes from interfering with the plaintiffs in the use and enjoyment of a certain piece of land which the defendant claims is a part of one of the public streets of the city, but which the plaintiffs claim is not a part of any street, but belongs to them as their separate and individual property. The case was tried before the court below, without a jury, at a term of the court begun and held on January 7, 1884. After the plaintiffs had introduced their evidence and rested, the defendant demurred to the evidence, which demurrer was sustained by the court, and the court then found generally in favor of the defendant and against the plaintiffs, and rendered judgment accordingly. On February 16, 1884, the plaintiffs filed a motion for a new trial. What the grounds set forth in this motion for a new trial were, or whether any grounds were set forth for a new trial, is not shown by the record. On March 1, 1884, the motion for a new trial was overruled, and the court then extended the time 20 days for making a case for the supreme court. The case was made and served within the time fixed by the court, and it was settled, signed, and authenticated on March 27, 1884, and on February 24, 1885, the case was brought to this court for review.

Whether the motion for the new trial was filed within three days after the finding and judgment of the court below is not shown by the record; nor is it shown upon what ground the motion for the new

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trial was made. No case was made for the supreme court within three days after the judgment was rendered, (Civil Code, § 548;) nor was the time for making a case extended within three days after the rendering of the judgment. *Ætna Life Ins. Co. v. Koons*, 26 Kan. 215. The time, however, for making a case was extended within three days after the motion for the new trial was overruled, and the case was made, as before stated, within the extended time. Nor was the case brought to this court within one year after the judgment was rendered. Section 556, Civil Code, as amended by Laws 1881, c. 126, § 2; *Estate, etc., v. Loftus*, 27 Kan. 68; *Bennett v. Dunn*, 27 Kan. 194; *Brown v. Clark*, 31 Kan. 521; S. C. 3 Pac. Rep. 415. Of course, under such circumstances, we cannot review any judgment or order of the district court, except the order overruling the motion for the new trial, and such other orders, rulings, or judgments as may be necessarily involved in the ruling upon the motion for the new trial; for the case for the supreme court was not made and served within proper time to give us authority to review such other orders, rulings, or judgments, independent of the ruling upon the motion for the new trial. See the foregoing statutes and authorities.

But, under the circumstances of this case, can we reverse the order of the district court overruling the motion for the new trial? As before stated, there is nothing in the case that shows that the motion was filed in time; nor is there anything that shows upon what grounds, if any, the motion for the new trial was made. From anything appearing in the record, the motion for the new trial may have been filed more than three days, and, indeed, as many as nine days, after the judgment was rendered in the case, and it may not have stated any ground for the new trial, or it may have stated an entirely insufficient ground,—one not recognized by any proper practice, or by any law. How, then, can we say that the court below erred? Error is not to be presumed, but in all cases where it is alleged it must be affirmatively shown, and certainly no error has been affirmatively shown in this case. But if we should go further, and examine the evidence introduced on the trial, we should find many defects and imperfections in the plaintiffs' proof. The evidence does not show that the first plat filed by Crane,—the plat under which the plaintiffs wish to have their rights determined,—was ever signed or acknowledged. Neither does the evidence show that Mrs. Angell, the person under whom the plaintiffs claim title, had any legal title to the property in controversy at any time until some time after Crane had filed his second plat, and at that time the legal title was in Crane; and if the second plat is to govern in this case, then the property in controversy is a part of Quincy street, in the city of Topeka, and the plaintiff has no right to recover. According to the proof of what the first plat was, the plat itself having been lost, the original western boundary of Crane's addition is indicated by certain "red dotted lines," but where such "red dotted lines" are or were is

not shown by the record. All the record title which Mrs. Angell ever had was a quitclaim deed from Crane; but this quitclaim deed was not executed until after Crane had filed his second plat. The plaintiffs, however, claim that prior to that time Mrs. Angell held under a written contract from Crane; but Crane testified that he never executed any such written contract, and none was introduced in evidence. The evidence also shows that at one time a judgment was rendered in favor of the city of Topeka and against Mrs. Angell, determining that she had no interest in the property in controversy. Just when this judgment was rendered is not shown by the record, but counsel for the defendant says that it was rendered on August 5, 1882, after the quitclaim deed was executed by Crane to Mrs. Angell, and before the deed was executed by Mrs. Angell to the plaintiffs. It is wholly unnecessary, however, to comment further upon the evidence, for in the condition in which the case has been brought to this court we cannot decide the case upon the evidence. The fact that no case was made for the supreme court, nor any extension of time given for that purpose within three days after the judgment was rendered, and the further fact that the case was not brought to the supreme court within one year after the judgment was rendered, precludes our examination of the judgment, or any ruling involved therein, or any ruling of the court below made prior thereto, except so far as such judgment or ruling may be involved in some subsequent ruling properly reviewable by the supreme court, as, for instance, the ruling on the motion for the new trial; and the fact that it is not shown that the motion for the new trial was filed within three days after the judgment was rendered, and the further fact that it is not shown upon what ground, if any, the motion for the new trial was made, renders it impossible for us to say that the court below erred in overruling the motion for the new trial.

The judgment of the court below will be affirmed.

(All the justices concurring.)

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(84 Kan. 724)

SAMUEL BOWMAN DISTILLING Co. v. NUTT.

Filed March 5, 1886.

**SALE—ACTION FOR PRICE—SALE FOR ILLEGAL PURPOSE.**

Mere knowledge by the vendor of goods, lawfully sold in one state, that the vendee intends to use them in violation of law in another state, will not defeat an action brought in such other state by the vendor against the vendee for the purchase price of the goods. In order that the action in such a case may be defeated, it must be further shown that the vendor sold the goods for the purpose that the law should be violated, or that he had some interest in its violation, or that he participated in some manner in the unlawful purpose. *Feineman v. Sachs*, 38 Kan. 621; S. C. 7 Pac. Rep. 222.

Error from Atchison county.

This was an action brought by the Samuel Bowman Distilling Company, a corporation, against A. R. Nutt, before a justice of the peace

of Atchison county, Kansas, to recover \$113.42, for intoxicating liquors previously sold and delivered by the plaintiff to the defendant. With the plaintiff's bill of particulars, it filed two exhibits, as follows:

"EXHIBIT A.

"No. 22.

ATCHISON, March 9, 1883.

"Bowman Distilling Company, St. Louis, Mo.: We have this day ordered through your Mr. Shullman following goods, to be shipped by Missouri Pacific at lowest rates:

1 B. Millwood, spring '81,	-	-	-	-	-	-	\$1 75
5 G. Sweet Catawba,	-	-	-	-	-	-	1 00
10 G. Calif. Riesling,	-	-	-	-	-	-	1 25
12 Oporto wine,	-	-	-	-	-	-	1 90

—which please forward to us, and for which we agree to accept draft at 90 days from date of shipment.

Yours, respectfully,

[Signed]

"A. R. NUTT."

"EXHIBIT B.

"St. Louis, March 13, 1883.

"A. R. Nutt, Esq., Atchison, Kan., bought of Bowman Distilling Company, 90 days, or 3 per cent. off if paid within 10 days:

1 Brl. Millwood, spring '81, 40½ galls., \$1.75,	-	-	-	\$70 87
1 Keg, 75; Sweet Catawba, 5 galls., at \$1.00,	-	-	-	5 75
1 Keg, \$1.00; Calif. Riesling, 10 galls., \$1.25,	-	-	-	13 50
1-10 Cask Oporto port, 12 galls., \$1.90,	-	-	-	22 80
Cartage,	-	-	-	50

\$113 42"

Afterwards a trial was had before the justice of the peace, and judgment was rendered in favor of the plaintiff and against the defendant, and the defendant appealed to the district court. Afterwards a trial was had before the district court, without a jury, and the court made the following findings and conclusions, to-wit:

"CONCLUSIONS OF FACT.

"(1) On March 9, 1883, the plaintiff was, and ever since it has been, a corporation, duly organized and existing under the laws of the state of Missouri, having its principal office and place of business at St. Louis, Missouri, and engaged as a wholesale dealer and jobber of whiskies, wines, and other intoxicating liquors, which business was, on March 9, 1883, and ever since has been, lawful in the state of Missouri.

"(2) On March 9, 1883, and for some considerable time afterwards, the defendant, A. R. Nutt, was the keeper of a billiard hall and saloon combined, in the city of Atchison, in Atchison county, Kansas, and his business, in part, was the sale of intoxicating liquors in said saloon without having any permit from the probate judge therefor, and for other than medical, scientific, and mechanical purposes; and such intoxicating liquors were sold by said A. R. Nutt by the drink over a bar in said saloon, and in so far as his business included the sale of intoxicating liquors it was wholly unlawful.

"(3) On March 9, 1883, Henry Shullman, the duly-authorized traveling agent and salesman of the plaintiff, called upon said A. R. Nutt at said billiard hall and saloon, at Atchison, and solicited said A. R. Nutt to agree to purchase and to order from the plaintiff intoxicating liquors, and said A. R. Nutt then and there agreed to purchase the certain intoxicating liquors sued

for in this action, at certain agreed prices; and said agent agreed to order said liquors from the plaintiff at St. Louis, and to have them forwarded to said A. R. Nutt at Atchison, by railroad, said order, however, to be subject to the approval of the plaintiff. Said agent thereupon wrote and the said A. R. Nutt signed the instrument, a true copy of which is annexed to the plaintiff's bill of particulars as Exhibit A, and said agent forwarded said instrument to the plaintiff at St. Louis. It was the understanding of the said agent and said A. R. Nutt that the plaintiff was to select from its stock of liquors at St. Louis the goods ordered, which were to correspond with certain samples shown to said A. R. Nutt by said agent at the time, and to ship the same at St. Louis, by railroad, consigned to said A. R. Nutt at Atchison.

"(4) Said agent of the plaintiff knew at said time the nature of the business of said A. R. Nutt, and that said liquors were ordered for the purpose of unlawfully selling the same at retail over said bar at said place, in Atchison, for use as beverages, and not for medical, scientific, and mechanical purposes, nor for any of said last three named purposes.

"(5) The plaintiff duly filed said order, and shipped said whiskies and wines, consigned to said A. R. Nutt at Atchison, and he received the same, except that about four gallons of the California wine ordered, at \$1.25 per gallon, leaked out of the cask, and the plaintiff's said agent, who afterwards called again upon said A. R. Nutt to solicit another order for liquors, agreed to suffer the loss of said leakage. A true account of the whisky and wines so shipped appears as Exhibit B, attached to the plaintiff's bill of particulars.

"(6) Said A. R. Nutt sold said whisky and wines in the usual course of his business as aforesaid; but he has never paid for the same, nor any part thereof, although payment has often been demanded of him by the plaintiff."

#### "CONCLUSIONS OF LAW

"(1) The enforcement of said contract for the sale of said intoxicating liquors, under the circumstances of this case, would be against the public policy of this state.

"(2) The plaintiff is not entitled to recover in this action.

"(3) The defendant is entitled to judgment against the plaintiff for costs."

Upon these findings and conclusions the court below rendered judgment in favor of the defendant, and against the plaintiff, for costs, and to reverse this judgment the plaintiff, as plaintiff in error, now brings the case to this court.

*Jackson & Royse*, for plaintiff in error.

*J. C. Tomlinson*, for defendant in error.

VALENTINE, J. This was an action brought in Atchison county, Kansas, by the Samuel Bowman Distilling Company, a corporation, against A. R. Nutt, for intoxicating liquors previously sold and delivered by the plaintiff to the defendant. The plaintiff is a wholesale liquor dealer at St. Louis, Missouri, and its sales there made of intoxicating liquors are legal and valid. The defendant is a saloon keeper, in Atchison, Kansas, and his sales there made of intoxicating liquors are illegal, and contrary to the statutes of Kansas. The liquors sold in the present case were first ordered by letter by the defendant at Atchison, Kansas, at the instance of the plaintiff's agent, who was then in Atchison, and had knowledge of the kind of business in which the defendant was engaged, and presumably

had knowledge also of the laws of Kansas, and therefore had knowledge that the defendant was engaged in the sale of intoxicating liquors in violation of law, and that he desired to purchase the liquors in the present case for such unlawful purpose. The order of the defendant for the liquors was subject to the approval or disapproval of the plaintiff at St. Louis, Missouri. The plaintiff, however, approved the order, selected the liquors from its stock of liquors at St. Louis, Missouri, and then delivered the same to a railroad company to be by it transported to the defendant at Atchison, Kansas, at the defendant's cost, and the defendant was to pay the plaintiff the value of such liquors at the end of 90 days, which time elapsed before this action was commenced, and the defendant had not then and has not since paid for such liquors. The defendant claims that the plaintiff sold the liquors to him knowing that he would again sell them in Kansas, in violation of the laws of Kansas, and therefore he claims that the sale, though legal in Missouri, was illegal and void as to Kansas, and that the plaintiff cannot recover in Kansas anything from the defendant for the liquors sold and delivered by the plaintiff to the defendant.

The plaintiff constructively had knowledge, in Missouri, through the actual knowledge of its agent, in Kansas, that the defendant purchased the liquors for the purpose of unlawfully selling the same in Kansas; but there is no pretense that the plaintiff in any manner participated in this unlawful purpose, and no pretense that it was to derive any benefit from any of the illegal acts perpetrated, or intended to be perpetrated, by the defendant in Kansas. So far as appears from the record, the plaintiff sold these liquors in the same manner and for the same prices as it sells like liquors to its other customers, who purchase the same for lawful and legitimate sale or use. Nor did the plaintiff pack the liquors in such a manner as to conceal their real character, or pack them in any manner different from the manner in which it packs like goods for its other customers, who purchase for lawful and legitimate purposes. So far as anything is shown in the record, it sold the goods for the same prices, and packed them in the same manner, that it would sell and pack like goods sold to legitimate druggists in Kansas, who have permits to sell intoxicating liquors, and who do sell them only in accordance with the statutes of Kansas. Under all the authorities, the sale of these liquors was a sale in Missouri, and not a sale in Kansas, and the sale was legal and valid in Missouri; therefore the only thing that can be urged against the plaintiff's right to recover in this action is its constructive knowledge of the defendant's wrongful intent to sell the intoxicating liquors in an unlawful manner, and for an unlawful purpose. Now, mere knowledge by the vendor of goods, lawfully sold in one state, that the vendee intends to use them in violation of law in another state, will not defeat an action brought in such other state by the vendor against the vendee for the purchase price of the goods.

*Feineman v. Sachs*, 33 Kan. 621, 625, 626, S. C. 7 Pac. Rep. 222, and cases there cited, to-wit: *Hill v. Spear*, 50 N. H. 253; *Holman v. Johnson*, 1 Cowp. 341; *Gaylord v. Soragen*, 32 Vt. 110; *McIntyre v. Parks*, 3 Mete. 207; *Smith v. Godfrey*, 28 N. H. 379; *Orcutt v. Nelson*, 1 Gray, 536; *President, etc., v. Spalding*, 12 Barb. 302; *Tracy v. Talmage*, 14 N. Y. 162. See, also, upon this same subject, and supporting the foregoing proposition, the following authorities: *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. Andrews*, 41 Tex. 363; *Dater v. Earl*, 3 Gray, 482; *Tegler v. Shipman*, 33 Iowa, 195; *Pellecat v. Angell*, 2 Crompt., M. & R. 311; *Sortwell v. Hughes*, 1 Curt. 244. About the only authorities which are seemingly opposed to the foregoing proposition are the following: *Territt v. Bartlett*, 21 Vt. 184; *McConihe v. McMann*, 27 Vt. 95; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167; *Davis v. Bronson*, 6 Iowa, 411; *Second Nat. Bank v. Curren*, 36 Iowa, 555; *Bancher v. Mansel*, 47 Me. 58. But these authorities last cited do not furnish much opposition to the general doctrine above enunciated. The Vermont decisions, for instance, make a distinction as between mere knowledge by the vendor of the illegal purpose of the vendee, and knowledge *with the intent by the vendor to assist in carrying out such illegal purpose*. See 21 Vt. 189, 190; 27 Vt. 99; and the later case of *Gaylord v. Soragen*, 32 Vt. 112, where the following language is used:

"Mere knowledge by the vendor of goods, selling them in a foreign state, that the vendee intends to use them in violation of the laws of this state, is not sufficient to invalidate the contract, when it is sought to be enforced in our courts. Our own courts have recognized this rule, (*McConihe v. McMann*, 27 Vt. 95;) and it is now generally adopted in this country and in England, though the contrary doctrine has received the support of some eminent judges and jurists."

The decisions in Massachusetts, reported in 74 Mass. 584, and 102 Mass. 167, do not purport to overrule the previous decisions made in that state, but attempt to make a distinction. It is not held in that state that knowledge alone of the intended illegal sale will defeat the action, but it is knowledge of such intended illegal sale, "with a view" that the intended illegal sale shall be consummated,—74 Mass. 584,—and "reasonable cause of belief" of such intended illegal sale is not sufficient, (102 Mass. 167.)

The decisions in Iowa are made under a special statute; but even in that state it is held that mere knowledge of the law alone will not render the contract invalid, (*Second Nat. Bank v. Curren*, 36 Iowa, 555;) and in the case of *Tegler v. Shipman*, 33 Iowa, 195, 200, it is stated that it is not held that mere knowledge on the part of the seller of the intended violation of the laws by the purchaser would necessarily vitiate or avoid the contract.

The case of *Bancher v. Mansel*, 47 Me. 58, is also decided under an express statute; but in that case it was merely held that knowl-

edge on the part of the vendor, and "acts, beyond the mere sale, which aided the purchaser in his unlawful design," would defeat the vendor's action. See, also, *Torrey v. Corliss*, 33 Me. 333.

It may be urged with much reason that knowledge alone by the vendor of the intended unlawful use of the property by the vendee should defeat the vendor's action against the vendee for the purchase price of goods sold and delivered, but the great weight of authority is on the other side; and we have chosen to follow the authorities. Knowledge alone by the vendor in such cases is not sufficient. In order that the action by the vendor in such cases may be defeated by the vendee it must further be shown that the vendor sold the goods for the purpose that the law should be violated, or that he had some interest in the violation of the law, or that he participated in some manner in the unlawful purpose. In fact courts do not like to relieve parties from their contracts after the contracts have been executed and performed on the other side, and after the parties asking to be relieved have received and enjoyed all the fruits and benefits which they expected to receive or enjoy from their contracts; and especially courts do not like to relieve those parties in such cases who have committed the principal wrongs themselves, and who plead their own wrongs for the purpose of being so relieved. Besides the distinction made between mere knowledge and knowledge with something more, there is also a well-recognized distinction between executed and executory contracts.

The judgment of the court below will be reversed, and cause remanded, with the order that judgment be rendered in favor of the plaintiff, and against the defendant, upon the special findings of fact made by the court below.

(All the justices concurring.)

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WESTHEIMER v. NUTT.

Filed March 5, 1886.

Error from Atchison county.

*Jackson & Royse*, for plaintiff in error.

*John C. Tomlinson*, for defendant in error.

PER CURIAM. Upon the authority of the decision just rendered in the case of *Samuel Bowman Distilling Co. v. Nutt*, ante, 168, the judgment of the court below in this case will be reversed, and cause remanded, with the order that judgment be rendered in favor of the plaintiff and against the defendant upon the special findings of fact made by the court below.

## SUPREME COURT OF CALIFORNIA.

(68 Cal. 623)

## PEOPLE v. BUSH. (No. 20,084.)

Filed February 26, 1886.

1. **HOMICIDE—MURDER—MODIFICATION OF ORDER FOR VIEW OF LOCUS IN QUO.**  
In a prosecution for murder a modification by a judge out of court, and without the defendant's knowledge, of an order duly made for the jury to view the *locus in quo* of the offense, is not prejudicial error, if the modification of such order was favorable to defendant.
2. **SAME—VIEW BY JURY OF LOCUS IN QUO—KEEPING JURY TOGETHER.**  
The requirement that a jury shall be kept in a body is sufficiently complied with if, where the jury are transported to the *locus in quo* in several wagons, such wagons are at all times in sight of each other, and if, during an intervening night, the jury occupied rooms at a hotel to which access by others was impossible.
3. **CRIMINAL LAW—TRIAL—ABSENCE OF DEFENDANT FROM COURT-ROOM.**  
In a criminal trial, mere absence of the defendant from the court-room for an inappreciable space of time during the trial will not warrant a reversal.
4. **SAME—JURY—CONSULTATION WHILE VIEWING LOCUS IN QUO.**  
The fact that the jury whispered among themselves while viewing the place of a homicide is not such misconduct as will warrant a reversal.
5. **SAME—ARGUMENT—OBJECTIONABLE REMARKS BY COUNSEL.**  
On a prosecution for homicide, the fact that counsel for the prosecution stated to the jury in his address his own impression on hearing of the homicide, while objectionable conduct, if made in reply to similar remarks by the defendant's counsel will not warrant a reversal.<sup>1</sup>
6. **WITNESSES—EVIDENCE OF CHARACTER.—OBJECTIONS TO, HOW TAKEN.**  
Where questions by the prosecution in a criminal trial, concerning defendant's character for truth, honesty, and integrity, are objected to on the ground that they are incompetent and irrelevant, but no objection is made to the form of the questions, the defendant cannot, on appeal, complain that such questions should have been directed to the general character of the defendant for truth, honesty, and integrity.
7. **HOMICIDE—VIEW OF LOCUS IN QUO—PRESENCE OF DEFENDANT NECESSARY.**  
A view of the *locus in quo*, pending a trial for murder, must be had in the presence of defendant, and if such view is had in his absence, this will be ground for reversal, as it is in violation of defendant's rights under the California constitution to appear and defend in person, and with counsel, and to be confronted with the witnesses against him on his trial.

MYRICK and MCKEE, JJ., dissent.

Commissioners' decision.

In bank. Appeal from superior court, county of San Diego.

Z. Montgomery, Levi Chase, and W. J. Hunsaker, for appellant.

Wallace Leach, J. L. Copeland, and E. W. Hendricks, for respondent.

FOOTE, C. The defendant was tried upon an information for murder. He was found guilty by the jury of that crime in the first de-

<sup>1</sup>See note at end of case.

gree. From the judgment of conviction, and an order denying him a new trial, he appeals.

There were numerous matters occurring during the trial upon which the defendant bases his contention that the judgment and order should be reversed and a new trial awarded him. It appears from the record that upon the trial there was evidence given, both by witnesses for the prosecution and the defense, in relation to the place where the homicide occurred, and of the relative positions then and there occupied by the defendant, the person killed, and the witnesses, and of certain natural objects there existent. From the nature of that testimony it appeared proper to the trial judge that the jury should view the place in which the offense was charged to have been committed, and the places at which certain other material facts occurred, and upon motion duly made by counsel for the people under section 1119, Pen. Code, the court made the following order:

"Whereas, it appears to the court that it is proper and necessary that the jury should view certain places represented on the diagram used in this case marked 'Map of Road from Julian to House of J. J. Bush, San Diego County, by C. J. Fox, 1884,' hereinafter specified, it is ordered that the jury be conducted in a body, in custody of the sheriff, to such places and that the witness Valentine show to said jury the following places, viz.: *First*, the hotel in Julian; *second*, the blacksmith's shop; *third*, the stable near said blacksmith's shop; *fourth*, the road traveled by the witness and John Ivey the day of the killing of John Ivey, when they left Julian; *fifth*, the place where he (Valentine) was when he first saw the defendant, J. J. Bush, after leaving Julian on the day of the killing; *sixth*, the place where he (Valentine) was when he next saw the defendant, J. J. Bush; *seventh*, the places on the road where the said Bush was when he (Valentine) saw him at the two times before mentioned; *eighth*, the place where the killing of John Ivey took place; *ninth*, the rock near by, marked on said map; *tenth*, the trail going to the house of J. J. Bush from the Julian road. And that said sheriff return said jury into court without unnecessary delay.

"It is ordered that the interpreter, William Lyons, heretofore sworn as such in this case, accompany the witness Valentine, and that a copy of this order be furnished said sheriff, and be interpreted to said witness Valentine, so that he may be enabled to point out the said places."

The sheriff and Charles T. Murphy, his deputy, were then sworn in open court in accordance with the terms of section 1119, *supra*. On the next morning, which was Sunday, the twenty-sixth of September, 1884, at an early hour, the judge of said court called upon the said sheriff at the hotel, where he and the jury were making preparations to start on the journey that had been specified in the said order, and obtaining from him the certified copy of said order in the sheriff's possession, but without the hearing of the jury, made certain changes in the same, viz.: By striking out the parts thereof embraced under the fifth, sixth, and seventh heads, by drawing a line with a pen and ink through the writing of them all, and then and there placed the following indorsement thereon: "The foregoing order is modified so as to strike out and omit the fifth, sixth, and seventh places mentioned therein.—W. T. McNEALY, Judge." And af-

terwards, on the convening of the court, an order was made in open court modifying the said original order in the manner above specified. The defendant claims that this modification was made out of court, without his knowledge, and that he did not know of it until the jury had gone on their way to the scene of the killing, and that no offer was made after the modification to allow him to accompany the jury.

The jury journeyed to the place of the alleged homicide in two wagons, one containing seven of them and the sheriff, and the other five of them and the deputy-sheriff. During the trip the wagons were always in sight of each other. Julian was reached by the whole party that night, and the sheriff engaged for their occupancy at the hotel rooms on the second floor thereof, and at the rear of the building. There was a hallway between those rooms, and the sheriff and his deputy occupied a room at the head of the stairway. The jury occupied several rooms, but there does not appear to have been any way of access by stairs, or otherwise, to their apartments from the outside or inside of the hotel, save by the stairway where the sheriff and his deputy were stationed, and which station must be passed before any one could reach the jury. There is no evidence whatever that the jury had, or could have had, any communication with any one but with each other and the officers under whose charge they were. A man rode up to them in the road at one time, and asked if that "was the jury in the Bush case," but he was immediately ordered off by the sheriff, and left at once. On the morning after the night of their arrival at Julian, the jury, in a body, in charge of the said sheriff and his deputy, were conducted to the places mentioned in the order of the court, and the various points and objects therein specified pointed out and named to them by the witness Valentine, except those which had been stricken out by the court. No other communication was made to the jury by Valentine, except that at one time he pointed with his hand towards a certain place, and commenced a sentence by saying "the horse—" but he was immediately stopped by the sheriff. The striking out by the judge of the fifth, sixth, and seventh clauses of the original order was done out of abundant caution, and with the intention of preventing any possible wrong being done to the defendant, and of that action merely he cannot be heard to complain. The jury were transported upon their journey in a mode which, under the circumstances of this case, did not in any manner conflict with the rule that they should always, during such a trial, be kept in a body; and so it was as to the manner in which they slept. And it does not appear anywhere in the record, during this journey, or at any time in the progress of the trial, that any sort of effort was made to tamper with the jury.

The point is made that error prejudicial to the defendant occurred by his being absent from the court-room during a part of the trial. This appears to have been for an inappreciable space of time, if at all, while his counsel was preparing to begin an address to the jury; and

the refusal of the court to correct its minutes so as to show that any such absence had in reality occurred, upon the evidence produced before it, was justifiable.

The fact that the jury whispered among themselves while viewing the locality where John Ivey was killed is not, of itself, sufficient error to warrant a reversal of the judgment in this cause.

Granting that the evidence given on the trial of this case was conflicting, nevertheless it was the province of the jury who heard it, and whose verdict as found was based upon it, to determine what evidence was entitled to credence; and that they did so is no error prejudicial to the defendant.

The arguments made by counsel on both sides to the jury, wherein they stated their several impressions on hearing of the killing of Ivey by the defendant, were commenced, it seems, by the attorney for the defendant, and his example was followed in turn by counsel for the people. The former asked that the latter be restrained by the court; but this that tribunal declined to do because what was being said was in reply to a similar argument to the jury that had been made just before by the objector. That proceeding upon the part of the gentlemen of the bar was objectionable, but under the circumstances, the court having fully instructed the jury upon the law as applicable to the matter, we perceive no just cause of complaint against that tribunal.

The defendant also assigns as error the ruling of the court, on the objection made by his counsel, to questions put to witnesses for the prosecution as to his character for truth, honesty, and integrity. The objection as made was for incompetency and irrelevancy; but no specific objection was made that the witnesses were not asked what the *general* character of the defendant was for truth, honesty, and integrity; and while it is true that in putting such a question the word "general" ought always to be employed, yet it appearing that on the occasions here complained of neither the court nor the attorneys for the prosecution were advised by the objector that the form of the questions asked was what was aimed at, nor what particular form thereof was claimed to be indispensable, the defendant cannot be heard to complain for the omission of his counsel to put the court in possession of the exact point of his objection.

There remains for discussion but one other point made by the defendant for the reversal of the judgment; but it is one of grave importance and of far-reaching character. He claims that section 1119, which authorizes a jury to be taken from the court-room, where a trial for murder is being had, to view a place or places elsewhere, does not in its terms authorize such action to be taken unless the defendant be present during the whole time of such view, and that, if such view is in fact had in his absence, it is in violation of his constitutional right "to appear and defend in person and with counsel," (article 1, § 8, Const. Cal.;) and that by the same section of that

constitution, being secured in his right to be confronted with the witnesses against him on his trial, such right is violated unless he be present at such a view.

For wise and proper reasons, and in pursuance of a good purpose, in certain instances, the trial court is authorized to send a jury trying a criminal cause to "view the place in which the offense is charged to have been committed, or in which any other material fact occurred;" but the law which confers this authority does not declare that this may be done without the presence of the defendant and his counsel. It is impossible that a jury could go and view such a place without receiving some evidence through one of their senses, viz., that of sight.

In the case at bar there was a conflict in the evidence which had been submitted to the jury, between that given by witnesses for the defendant and that by Valentine, the principal witness for the people. There is little doubt that the order made for the view was for the reason that the court thought it necessary for the jury to determine, by looking at various physical objects, extending along a road for some distance, which was the true and reliable testimony as to the matters where this conflict existed. They went to the places designated in the order, and Valentine, the witness, pointed out and named to them the objects therein embraced. The jury viewed them all as they lay along the road, and therefrom must have determined which evidence, upon certain points, they deemed most worthy of belief. They thus received evidence in the absence of the judge, the defendant, and his counsel.

The order made by the court did not require the defendant to go and be present with his counsel at such view. Suppose that upon the trial, after the witnesses had testified as to the occurrences which transpired at the places named in the order, instead of making the order a photograph of all such places had been offered and allowed by the court to go in evidence to the jury, in the absence of the defendant and his counsel, can it be successfully contended that the defendant could be debarred from claiming and having awarded him a new trial for manifest error? It is often most important for the defendant and his counsel to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given in on his trial; and it may frequently happen that it is within their power then to introduce other evidence which might tend to disabuse that body of a wrong impression, or the counsel might, by fair and legitimate argument, be able to convince them of the right view to be taken of such evidence. It is to insure to the defendant in all cases of such a nature a fair and impartial trial by a jury of his countrymen that the constitutional enactment was made the supreme law of the land.

The defendant objected to the order of view as made originally and as modified. He was not present when the jury inspected

the various places named in that order, and it is fair to presume that what they then and there saw tended to or did influence their verdict. This court, in the case of the *People v. Green*, 53 Cal. 60, where a similar order was made and action taken with the jury, used this language: "The action of the court was opposed \* \* \* to the principle which gives to a defendant the privilege of being confronted by the witnesses against him." Judge Cooley, in his work on Constitutional Limitations, (5th Ed.) § 319, says: "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment." And in note 1 of the section, *supra*, this is said: "In capital cases the accused stands upon all his rights, and waives nothing." *Dempsey v. People*, 47 Ill. 325; *People v. McKay*, 18 Johns. 217; *Burley v. State*, 1 Neb. 385. And further, as to the inability of a defendant to waive a constitutional right, see *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Wilson v. State*, 16 Ark. 601; *Bond v. State*, 17 Ark. 290; *Brown v. State*, 16 Ind. 496.

In the case of *State v. Bertin*, 24 La. Ann. 47, similar to the one in hand, (except that there was no statute of the state of Louisiana authorizing a view of places,) this language occurs:

"Concede that in the absence both of the accused and the judge (for the judge did not accompany the expedition) the witness obeyed these instructions to the letter, which were as follows: 'To make no explanations, but to confine himself to pointing out appearances as described in said diagram,'—it would result merely that the witness gave testimony on the premises, out of court and in the absence of the accused; gives testimony, namely, by signs, and it needs no argument to prove that the effect of such pointing out in dumb show is as potent with the jury as if the verification of the diagram had been enforced with a multitude of words. The object of law is the doing of real justice; it is but natural and proper, therefore, that criminal jurisprudence should protect the accused person by numerous safeguards, and among these is the rule that in general every proceeding of his trial shall take place in his presence; for, peradventure, if he be present he may, at any moment, by a question, a suggestion, an argument, or even a glance, confound his accusers, vindicate his innocence, or at least mitigate his punishment. Especially is this proper at the taking of testimony against him, and therefore in this state as in many others of this Union, it is provided by the constitution that the accused shall have the right to meet the witnesses against him face to face."

In *Gaunt*, Ark. Dig. §§ 1927, 1928, the statute authorizing a view in such a case as the one we are now discussing is almost *in totidem verbis* as our own section 1119 of the Penal Code. And in the case of *Benton v. State*, 30 Ark. 350, it is said:

"The view of the place where the crime is alleged to have been committed, by the jury, is part of the trial, and may be an important step in the trial, and the presence of the prisoner at the view, in a case involving life or liberty, that he may have an opportunity to observe the conduct of the jury, and whatever occurs there, might be of the utmost consequence to him. The judge who presides at the trial and hears the evidence must determine

whether or not a view is necessary; and if, in his discretion, he deems it necessary to order a view to be made, it would be better and safer for him to accompany the jury, if convenient, to see that nothing improper occurs at the view. If not convenient, he may appoint a person to show the jury the place to be viewed, sworn as directed by statute. If the jurors are familiar with the place, they may be conducted to it by a sworn bailiff in charge of them, and there could be no necessity for the appointment of another person to show them the place."

At page 349, same case, this is said:

"But though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross-examination."

By section 1043 of our Penal Code it is provided that the defendant must be present in person when on trial for a felony. In Arkansas a statute of the same kind was in force, and the supreme court of that state said of it that it was "declaratory and affirmatory of the common law, which would not allow any proceeding affecting life or liberty to be had in the absence of the prisoner, and when any step was to be taken in the cause the prisoner was to be present personally, lest in so important a matter he should be prejudiced. This care of the law for his safety was extended through the whole trial, from his arraignment to his final conviction or acquittal." *Sneed v. State*, 5 Ark. 432; *Cole v. State*, 10 Ark. 318; *Sweeden v. State*, 19 Ark. 209.

We are of the opinion that it is not intended by section 1119, Pen. Code, that a view to be taken by the jury of any place or places contemplated by that statute should ever be ordered by the court, or take place, unless in the presence of the defendant; and, in addition to the authorities above cited, the following bear out the correctness of that rule. *Whart. Crim. Pr. & Pl.* (8th Ed.) § 707; *State v. Sanders*, 68 Mo. 202; *Smith v. State*, 42 Tex. 444; *Carroll v. State*, 5 Neb. 31; *Eastwood v. People*, 3 Parker, Crim. R. 25.

The judgment and order should be reversed, and cause remanded for a new trial.

I concur: BELCHER, C. C.

SEARLS, C. I concur in the conclusion reached in the foregoing opinion, and hold that a defendant in a criminal case amounting to felony has a right to be tried in the presence of the court, of which the judge is an integral part; to be represented in every step of the case by counsel; to be personally present and be confronted by the witnesses against him; and section 1119 of the Penal Code, so far as it is in conflict with, or in any manner abridges, these rights or any of them, is unconstitutional and void.

THE COURT. For reasons contained in the foregoing opinions the judgment and order are reversed, and the cause is remanded for a new trial.

ROSS and SHARPSTEIN, JJ., agree with the views presented in the opinion of Commissioner FOOTE.

THORNTON and MCKINSTRY, JJ., concur *also* in the opinion of Commissioner SEARLE.

MYRIOK, J. I do not concur in the judgment, or in the reasons therefor.

McKEE, J. I dissent. Section 1119 Pen. Code; *People v. Bonney*, 19 Cal. 427.

#### NOTE.

For a full discussion of the question of abuse by and misconduct of counsel in the argument of a case to the jury, see *Petite v. People*, (Colo.) 9 Pac. Rep. 622, and note, 627, 628, and *State v. McCool*, (Kan.) 9 Pac. Rep. 745.

A judgment will not be reversed for misconduct of counsel in argument, unless it was such as to prejudice the substantial rights of the accused. *Shular v. State*, (Ind.) 4 N. E. Rep. 870.

It is only where the misconduct of counsel is of such a material character as to make it probable that the jury were misled that there can be a reversal therefor. *Boyle v. State*, (Ind.) 5 N. E. Rep. 203.

It is improper for a prosecuting attorney to make a statement to the jury of a fact as of his own knowledge, which has not been introduced in evidence under the sanction of an oath, relating to a material issue in the case, and if the accused is prejudiced thereby, the conviction may be set aside. *People v. Dane*, (Mich.) 26 N. W. Rep. 781.

(68 Cal. 561)

DILLON, Adm'r, etc., *v.* CENTER and others. (No. 8,696.)

Filed February 25, 1886.

#### 1. EJECTMENT—DEFENDANT'S POSSESSION TO BE SHOWN.

In an action of ejectment it is indispensable to a recovery by the plaintiff that it should appear that the defendant was, at the commencement of the action, in the possession of some part of the land sued for.

#### 2. SAME—GENERAL DENIAL—ADVERSE POSSESSION.

In an action of ejectment, an answer containing a general denial puts in issue the alleged possession of the defendant, and if, in addition, the defendant sets up title by adverse possession, the admission of possession contained in such special defense must be confined to that defense.

#### 3. SAME—NONSUIT AS TO PORTION OF DEMANDED PREMISES.

In an action of ejectment for the possession of several distinct pieces of land, the defendant may have a nonsuit as to such portions of the demanded premises as the plaintiff's evidence shows were in his own possession at the time of the commencement of the action.

#### 4. SAME—ADVERSE POSSESSION—LANDLORD'S DISCLAIMER AS EVIDENCE AGAINST TENANT.

Where, in ejectment, the defendant sets up title in his landlord acquired by adverse possession, the evidence of a disclaimer by the landlord in a prior ejectment suit for the same premises against the then possessor is admissible in such action.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

S. O. Houghton, for appellant.

T. H. Laine, for respondents.

BELCHER, C. C. This is an action of ejectment to recover possession of lot 1 of the N. W.  $\frac{1}{4}$ , and lots 2 and 3 of the N. E.  $\frac{1}{4}$ , of a cer-

tain section of land in Santa Clara county. In the complaint it is alleged that W. H. Dillon, plaintiff's intestate, died in April, 1877, and at the time of his death was the owner in fee and entitled to the possession of the premises described; that the plaintiff, as administratrix of his estate, took possession of the said premises in January, 1879, and continued to occupy the same until the seventh day of January, 1880, when she was ousted and ejected therefrom by the defendants. The defendant Alexander Center alone appeared. By his answer he denied all the allegations of the complaint, and then alleged that he, and those through and under whom he claimed, had had and held the actual possession of the lands and premises described in the complaint, and every part and parcel thereof, continuously, exclusively, and adversely to all the world for the five years next preceding the commencement of the action; and he further alleged that the plaintiff's cause of action was barred by the provisions of section 318 of the Code of Civil Procedure.

The case was tried by the court and judgment rendered in favor of the plaintiff, for the possession of the three lots described in the complaint, and for damages and costs. The appeal is from the judgment and an order denying a new trial.

When the plaintiff rested her case the defendant moved for a nonsuit as to lots 1 and 2 upon the ground that it appeared from the plaintiff's testimony that she was in possession of those lots when the action was commenced, and it did not appear that defendant ever had possession of any part of them. The motion was denied upon the ground that a nonsuit could not be granted as to a part of the demanded premises. We think the motion might and should have been granted. It is indispensable to a recovery in ejectment that it should appear that the defendant was, at the commencement of the action, in the possession of some part of the land sued for. The general denial contained in the answer put in issue the alleged possession of defendant, and the admission of possession contained in the special defense must be confined to that defense. *Miller v. Chandler*, 59 Cal. 540. The lots were severable and the only contest was as to a part of lot 3. It was unnecessary, therefore, to include in the action lots 1 and 2, and a judgment that the plaintiff recover the possession of those lots might be harmful to the defendant if an action should be commenced to recover rents and profits for them. 2 Greenl. Ev. § 333.

As above stated, the only real contest was in reference to about 16 acres of lot 3, and as to this piece it was claimed that the plaintiff's right of action was barred by the statute of limitations. It appeared from the evidence that W. H. Dillon became the owner of the three lots described in the complaint, in December, 1875. To sustain his claim under the statute of limitations the defendant then proved that in November, 1871, one John Center received a deed for a tract of about 300 acres of land known as the "Scott Place," and embracing the 16-acre parcel of lot 3; that the whole tract was then inclosed;

that shortly after receiving his deed John Center leased the whole tract to the defendant Alexander Center, and that he, as such lessee, had ever since occupied and used the premises, kept up the fences, and paid all the taxes on the land; and that John Center had always claimed to own all the land conveyed to him by his deed since he received it in 1871.

The plaintiff then proved that, in 1872, George Center, the father of Alexander Center, resided on the Scott place, and that in May of that year the said owner of the said lots 1, 2, and 3, commenced an action against him in the district court of the Fourth judicial district to recover their possession; that the papers in the case were served on George Center, and he immediately sent them to John Center, whom he considered "the responsible party;" that an answer was filed in the case by some one, but by whom George Center did not know; that between 1872 and 1879 the attorney for the plaintiff had a conversation with John Center about the land described in the complaint, and was told by him that he did not claim it; that again, in 1879, the attorney had another conversation with John Center about the land, and he, John Center, then asked that no judgment for costs should be taken against George Center in the case, as he did not claim the land, and the plaintiff might go and take possession without further trouble; that the case was tried in January, 1879, and judgment rendered in favor of the plaintiff for the possession of the premises described in the complaint; that an execution was issued on this judgment, and under it, on the sixteenth day of January, 1879, the sheriff of the county of Santa Clara placed the agent of the plaintiff in the quiet and peaceable possession of the land therein described; that in 1879 the plaintiff cut hay on the 16-acre parcel, and erected a barn and stored the hay in it, and also commenced to construct a fence to separate that parcel from the other land occupied by the defendant; that the defendant stopped the work of building the fence, tore down what had been built and excluded the plaintiff from the land. The plaintiff offered in evidence the judgment roll in the case against George Center, and the execution issued on the judgment with the sheriff's return thereon. The defendant objected to the offered evidence upon the ground that it was irrelevant and immaterial. The court overruled the objection, and this ruling is assigned as error.

We think the ruling correct. The evidence became admissible in connection with the uncontradicted statement of John Center, and the whole testimony in the case very clearly justified the court in finding that the action was not barred.

The case should be remanded, with directions to the court below to amend the judgment by striking therefrom lots 1 and 2, and as so amended the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the cause is remanded to the court below, with direction to amend the judgment by striking therefrom lots 1 and 2, and as so amended the judgment will stand affirmed.

(68 Cal. 611)

PEASLEY v. McFADDEN and others. (No. 11,014.)

Filed February 25, 1886.

1. **VENDOR AND VENDEE—POSSESSION OF LAND—EFFECT AS NOTICE.**  
Possession of land is notice to subsequent purchasers of all equities of the possessor of such land.<sup>1</sup>
2. **PLEADINGS—LIBERAL CONSTRUCTION TO BE GIVEN.**  
The allegations of a pleading must be liberally construed, with a view to substantial justice, for the purpose of determining its effect; and in every stage of the action errors or defects in the pleadings which do not affect the substantial rights of the parties must be disregarded.
3. **MISTAKE—REFORMATION OF WRITTEN CONTRACTS—PLEADING.**  
A complaint in an action to reform a written contract for the sale of land on the ground of mistake, sufficiently alleges such mistake if it states, in effect, that at the time the contract was executed both parties intended that it should, and understood that it did, include certain land, and that such land was omitted from the agreement by reason of an unconscious ignorance or forgetfulness of the fact that it was not included, or a belief that it was then included, therein. And in order to entitle such a contract to be reformed or enforced, it is not necessary that the agreement should show an adequate consideration; and therefore, in an action on the contract, no consideration for its execution need be alleged.

McKINSTRY, J., dissents.

Commissioners' decision. In bank. Appeal from superior court, county of El Dorado.

*George C. Blanchard and C. A. Swisler, for appellants.*

*M. P. Bennett, for respondent.*

BELCHER, C. C. This is an action of ejectment to recover the possession of a small lot of land in El Dorado county. The lot is a parcel of about 14 acres of land, known as the "Nashville Placer Claim," which one John C. Ensey sold and conveyed to the plaintiff on the twenty-fifth day of October, 1882. At that time the lot was covered by a building known as the "Gem Saloon," which had been erected thereon by the defendant Duncan, and was occupied by the defendants McFadden and Heald, as his tenants. The Nashville placer claim was patented to Ensey by the government of the United States on the fifteenth day of September, 1882, under an application made therefor by him at some time prior to the eighteenth day of March, 1878. When the application was made, and for several years before that, Duncan had been in possession of and had claimed to own a part of the land embraced in the application, including the lot in question. As early as 1866 he erected a building on the land adjoining this lot on the north, in which he carried on the business of merchandising until 1874. He also erected a barn and other buildings,

<sup>1</sup>See note at end of case.

which he used in connection with his store. The store, barn, and other buildings were inclosed by a fence. The lot in question was not within the inclosure, but he used it to pile wood upon and boxes from his store, and also kept there some barrels of water for use in case of fire. In 1874 he leased the store and other buildings to defendant Heald, who has continued ever since to occupy them as his tenant. Up to the time the Gem saloon was built Heald used the land on which it stands for the same purposes that Duncan had used it for.

On the eighteenth day of March, 1878, Duncan wrote and read to Ensey, and Ensey then signed, a contract by which, after reciting that he had made application for a patent for the Nashville mine, he agreed and bound himself, "for and in consideration of the sum of \$1 to me in hand paid, that as soon as I obtain a patent of said described land I will make out a good and sufficient deed to R. H. Duncan of said land he, said Duncan, has inclosed, and upon which his store, barn, dwelling, and warehouse stand." As soon as the contract was signed it was placed in Heald's safe, and was kept there, and not seen by Duncan until some time in 1882, after Ensey sold to plaintiff, when, hearing that Ensey had received his patent, he got it out and read it. Then, for the first time, he discovered that in writing the agreement he had omitted from the description of the land he had intended to describe the land and premises sued for in this action.

When the contract was made, and for a long time prior thereto, Duncan claimed to own the premises in dispute here, and he intended to have included the same in the written agreement, but unintentionally and by mistake omitted to do so. Ensey knew of the claim made to the said premises by Duncan, and knew from what had been said between them prior to the date of the agreement that Duncan intended to require of him a conveyance of the same as a part of the premises which he, Duncan, claimed within the lines of the Nashville placer claim. Ensey also had reason to know and suspect, at the time he signed the agreement, that Duncan had made a mistake in drawing it, and through such mistake had omitted the premises in dispute.

The complaint is an ordinary complaint in ejectment. The defendants answered, denying the plaintiff's ownership of the premises sued for; and the defendant Duncan, by way of cross-complaint, set out the contract for a deed, herein before referred to, and then alleged "that by mistake said agreement does not correctly describe the premises so to be conveyed; \* \* \* that at the time said agreement was executed the said parties thereto intended, and it was by them understood, that the premises therein described and agreed to be conveyed as above set forth should include the whole of the land and premises described in plaintiff's complaint, but that the same was omitted by mistake, and in order that the said agreement may conform to the intention of the said parties thereto at the time

of its execution, it is necessary that the same be reformed and made to read as follows: \* \* \*

The plaintiff answered the cross-complaint by denying fully that there was any mistake made in the drawing or execution of the agreement referred to, or that it was understood or agreed by the parties thereto that it should or did include the whole or any part of the premises described in plaintiff's complaint.

The case was then tried, and the facts found substantially as above stated.

As conclusions of law the court found:

"(1) The answer and cross-complaint does not show a mistake, within the meaning of section 3399 of the Civil Code. (2) That the agreement does not show an adequate consideration. (3) That the plaintiff is entitled to judgment for the possession of the premises sued for."

Judgment was entered in favor of the plaintiff, and from that judgment the appeal is taken and rests upon the judgment roll.

Two questions are presented for consideration in the case: (1) Was the mistake in the written agreement so pleaded that the equity powers of the court could be called into exercise to reform it? (2) The agreement being reformed so as to include the premises in controversy, did it furnish any defense against the plaintiff's claim to possession?

There can be no doubt that when the plaintiff bought the property from Ensey he took with notice of Duncan's claim to it. The lot was then entirely covered by the Gem saloon, which Duncan had built and was occupying by his tenants. This was full notice to the plaintiff of Duncan's equities. *Lestrade v. Barth*, 19 Cal. 660; *Dutton v. Warschauer*, 21 Cal. 609; *Pell v. McElroy*, 36 Cal. 271; *Tallert v. Singleton*, 42 Cal. 390. Duncan was entitled, therefore, to have the agreement reformed and enforced as against the plaintiff if he would have been as against Ensey, provided Ensey had not sold, but had commenced the action.

It is urged on the part of the respondent that the cross-complaint is insufficient to justify a reformation of the written agreement because it does not show that there was any mutual mistake of the parties in making it, or a mistake of one party which the other at the time knew or suspected, and because the allegation that at the time the agreement was executed it was intended and understood by the parties thereto that the premises therein described and agreed to be conveyed should include the land sued for is contradictory and unintelligible. It is clear that the cross-complaint was not artistically drawn, and if it had been tested by a demurrer, on the ground that it was ambiguous, uncertain, and unintelligible, it would probably have been held bad. It was not, however, demurred to, but its averments were denied, and upon the issues thus tendered the case was submitted. When thus tested, was it fatally defective?

A written contract may be reformed when, through a mutual mis-

take of the parties thereto, or a mistake of one party, which the other at the time knew or suspected, it does not truly express the intentions of the parties. Section 3399, Civil Code.

A mistake, as defined by the Code, is:

"(1) An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing, material to the contract, which does not exist, or in the past existence of such a thing which has not existed." Section 1577, Civil Code.

In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties, and in every stage of an action the court must disregard any error or defect in the pleadings which does not affect the substantial rights of the parties. Sections 472, 475, Code Civil Proc. As we read it, then, the cross-complaint, in effect, alleges that at the time the agreement was executed both parties intended that it should, and understood that it did, include the land sued for here, and that this land was omitted from the agreement by reason of an unconscious ignorance or forgetfulness of the fact that it was not included, or a belief that it was then included therein. This, we think, must be held sufficient as the case was presented.

The point that the agreement does not show an adequate consideration, and therefore cannot be reformed and enforced, is not well taken. At common law an adequate consideration was absolutely necessary to give validity to contracts not under seal, and in case of suits upon them the consideration was required to be alleged and proved. It was not so with sealed instruments; they imported a consideration which was presumed to be adequate. We have changed the rule of the common law in this state with reference to unsealed instruments. Our Civil Code provides:

"Sec. 1614. A written instrument is presumptive evidence of a consideration.

"Sec. 1615. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

It was not necessary, therefore, that the agreement set forth in the cross-complaint should show an adequate consideration, or that the defendant in pleading it should set forth any consideration for its execution. If it was not based upon a sufficient consideration, the burden was upon the plaintiff to plead and show that fact. Failing to do that, his contention here cannot be supported.

The judgment should be reversed and the cause remanded.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded.

McKINSTRY, J. I dissent.

## NOTE.

Implied or constructive notice may be as effectual as actual notice, and such constructive notice may arise from possession alone; but such possession must be open, notorious, exclusive, and unequivocal, and while actual residence is not necessary when there is no actual *pedis possessio*, dominion must be manifested by such open and notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so certain and definite in denoting ownership as not to be liable to be misunderstood or misconstrued. *Hodge's Ex'rs v. Amerman*, (N. J.) 2 Atl. Rep. 257.

Possession of land by parties at the time of the levy of an attachment is notice of their rights and equities in the premises to a purchaser at a sale under such levy, and he takes the property subject to the rights and equities which are capable of being enforced by the party in possession against the judgment creditor. *Story v. Black*, (Mont.) 1 Pac. Rep. 1. To the same effect are *Ray v. Birdseye*, 5 Denio, 626; *Jones v. Marks*, 47 Cal. 242; *McKinzie v. Perrill*, 15 Ohio St. 168; *Hughes v. U. S.*, 4 Wall. 232; *Landes v. Brant*, 10 How. 348. See, also, *In re Howe*, 1 Paige, 128; *Ells v. Tousley*, 1 Paige, 283; *White v. Carpenter*, 2 Paige, 219; *Buehan v. Sumner*, 2 Barb. Ch. 181; *Lounsbury v. Purdy*, 11 Barb. 494; *Kiersted v. Avery*, 4 Paige, 15; *Averill v. Loucks*, 6 Barb. 27; *Mason v. Wallace*, 3 McLean, 148; *Strong v. Smith*, Id. 362; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21; *Lake v. Doud*, 10 Ohio, 515.

(68 Cal. 618)

## LUCAS v. RICHARDSON. (No. 9,656.)

Filed February 25, 1886.

## 1. APPEAL—REJECTION OF EVIDENCE, WHEN REVIEWABLE.

Unless an exception was reserved to the ruling of a trial court in rejecting evidence, the action will not be reviewable on appeal.

## 2. DEPOSITIONS—TIME AND PLACE OF TAKING—NOTICE.

The statutory requisites concerning the taking of depositions must be strictly followed; and the requirement of notice of time and place of taking is insufficient if it fails to inform the adverse party of the place of business or office of the notary before whom the deposition is to be taken, if the same is to be taken in a city having a population of 50,000 inhabitants or over, and in which the streets are named and numbered.

## 3. EJECTMENT—STATUTE OF LIMITATIONS.

In ejectment, if the defendant sets up the statute of limitations, evidence that he leased the land to a tenant, and instructed him to keep stock of other people off the land, is admissible as tending to sustain his allegation of possession.<sup>1</sup>

## 4. APPEAL—FINDINGS AS TO ULTIMATE AND PROBATIVE FACTS—FINDINGS—EVIDENCE.

Findings held supported by the evidence. Where an ultimate fact in favor of an appellant has been found, an erroneous finding on the probative facts covering the same issue is not prejudicial to him, so as to warrant reversal.

Commissioners' decision.

In bank. Appeal from the superior court, county of Stanislaus.

*G. A. Whitby and Wright & Hazen*, for appellant.

*J. B. Hall*, for respondent.

SEARLS, C. This is an action of ejectment by plaintiff, as the heir and devisee of George C. Lucas, to recover 160 acres of land situate in the county of Stanislaus. Defendant denies plaintiff's title, avers title in himself, interposes the plea of the statute of limitations, and as a further and equitable defense sets out, in apt language, a verbal contract made in 1870 between himself and plaintiff's predecessor,

<sup>1</sup> For a general discussion of the statute of limitations, and when the statute begins to run, see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641, and *Glenn v. Saxton*, (Cal.) 9 Pac. Rep. 420, and note, 423.

George C. Lucas, by the terms of which defendant agreed to purchase upon certain terms—since that date fully complied with by him—the demanded premises. The cause was tried by the court, and defendant had judgment. The findings were against defendant upon the plea of the statute of limitations. The only additional facts necessary to be stated are that the legal title to the *locus in quo* vested in plaintiff as the heir and devisee of George C. Lucas, and that, under his contract of sale with said Lucas, defendant acquired an equitable title which, for the purpose of this decision, we shall assume was, if it still remains in him, or may be set up in this action, sufficient to bar plaintiff's right of recovery.

At the trial plaintiff offered to prove that subsequent to the acquisition by defendant of the equitable title he instituted proceedings in bankruptcy, in the district court of the United States for the district of California, in which proceedings an assignment in due form and sufficient in law to pass all the estate of said defendant to A. W. Moulton, the assignee therein named, was duly executed; also a final discharge in bankruptcy of said defendant in said cause, duly made and entered therein. The papers in bankruptcy were, and each of them was, duly certified and authenticated, so as to entitle them to be admitted in evidence, if they were material and proper testimony in the cause. To the introduction of this documentary evidence, counsel for defendant objected upon the ground "that it is irrelevant and immaterial." The objection was sustained by the court. We find no exception to this ruling, and are not, therefore, called upon to consider the question presented. The evidence was sufficient to warrant the findings of the court, and we are of opinion they cover all the material issues, and show such an equitable title in the defendant under an executed verbal contract for the purchase of the premises, accompanied by possession, as warranted the judgment in his favor.

The deposition of B. F. Marckley, offered by plaintiff, was properly excluded. The method of taking testimony by deposition is statutory, and all the essential requirements of the statute must be complied with. Among these requirements is a notice of the *time and place* of taking the deposition. *Williams v. Chadbourne*, 6 Cal. 559. It appears that the action was pending at Modesto, in Stanislaus county, and was set for trial on the twenty-second day of May; that defendant's attorney resided in Stockton; that on the fourteenth of May defendant's attorney received a written notice that the deposition in question would be taken on the twenty-first day of May, between the hours of 10 o'clock A. M. and 5 o'clock P. M., before Lee D. Craig, a notary public, in San Francisco, but the office or place of business of the said notary was not given; that to have reached Modesto at 10 A. M. of the 22d a passenger would have been compelled to leave San Francisco by train as early as 4 P. M. of the 21st. Defendant was not represented at the taking of the deposition, the time for giving notice of the taking of which had been shortened by an order of the

judge. In view of the fact that the notice of taking the deposition was short, and that it was to be taken in a city like San Francisco, the notice should have apprised the attorney for defendant of the office or place of business of the notary, and, not having done so, and no one having been present on behalf of defendant, the court was authorized, under section 2033 of the Code of Civil Procedure, to exclude the deposition. It may be difficult to formulate a general rule in reference to the particularity as to *place* required in notices of this character. Under section 2033, *supra*, something is left to the discretion of the court in excluding depositions, upon proof that sufficient notice was not given, or that "the taking was not in all respects fair." It would seem, however, that where depositions are to be taken in incorporated cities having a population of 50,000 inhabitants or over, in which the streets are named and numbered, the office or place of business of an officer before whom a deposition is to be taken should be specified by reference to the street and number, or by such other designation as will make the place easy of ascertainment.

The exceptions taken to the rulings of the court in permitting plaintiff's counsel to ask the witness John Richardson, on cross-examination, what use the defendant made of the land in dispute, and in permitting him to testify that he was instructed by defendant to keep stock of other people off the land, and that he did so, cannot be sustained. The testimony was proper in support of the possession which defendant had set up in himself, and tended to support his plea of the statute of limitations. The same considerations apply to the objection made and exception taken to the testimony showing a lease of the premises by defendant to Robert Young. If Young took a lease of the land in question from the defendant, and entered and held under such lease, his possession was that of his landlord, and was proper to be shown. So, too, the judgment roll in *Lucas v. Young* was admissible to show that the latter was in possession of the land, not as the tenant of the plaintiff, but under and by virtue of a lease from the defendant, Richardson, thus going to sustain the allegation of the defendant's answer as to his possession of the premises.

We think the evidence was sufficient to sustain the eighth finding of the court, which was to the effect that defendant paid all the taxes levied and assessed upon the land in suit from and including the year 1874-75 to the present time, except for the fiscal year 1880-81, the taxes for which year were paid by plaintiff. The contention of appellant is that for two years Moulton paid the taxes, and that for a third year the property was assessed to unknown owners, and it cannot be determined who paid the tax. The whole evidence in relation to the payment of taxes was introduced in support of the plea of the statute of limitations. By section 325 of the Code of Civil Procedure payment of all taxes levied upon the premises is an essential requisite in support of the bar of the statute of limitations. In the present case the court found that defendant did not pay the

taxes for the year 1880-81, and found against defendant upon his plea of the statute. The ultimate fact being found in plaintiff's favor, it cannot matter to him whether certain probative facts bearing upon the same issue were found for or against him.

We have said the findings are supported by the evidence, and it seems hardly necessary to quote from the testimony to show that the second, fourth, sixth, seventh, and eleventh findings are so supported. A perusal of the testimony convinces us, not only that there was evidence to warrant the findings, but that as to most of them there was little or no conflict.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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(68 Cal. 642)

HORTON v. DOMINGUEZ and others. (No. 11,178.)

Filed February 27, 1886.

1. APPEAL—FINDINGS—PRESUMPTION IN FAVOR OF.

Where nothing appears in the record to the contrary, it will be presumed that there was evidence introduced at the trial to sustain the findings.

2. SAME—FINDING WITHOUT ISSUES, EFFECT OF.

Where the record shows that the cause was tried as if certain facts found were put in issue, if no objection was made in the court below to the admissibility of the evidence supporting the findings, an objection that the findings were without issues will not be considered on appeal.

Department 2. Appeal from superior court, county of Ventura.

*Hall & Hamer*, for appellant.

*Blackstock & Shepherd*, for respondent.

THORNTON, J. The motion to dismiss the appeal is denied. Conceding that the contract made before the patent was issued was void, as against the states of the United States, it appears from the findings that after the patent was issued in November, 1879, another agreement was entered into between the parties, which is not void. This last agreement is as follows:

"That afterwards, to-wit, on or about the twenty-fifth day of December, 1882, in said Ventura county, defendants again demanded that said deed of conveyance should be executed to said lands to said Mercedes D. Dominguez, and that plaintiff then and there agreed he would execute and deliver said deed to said lands so described in his complaint when he, the said defendant, would execute and deliver to him, the said plaintiff, a deed of conveyance to a one-half interest in *his*, the said Prudencia Dominguez's, water-right, known as the Pires Ditch, the said interest being the one-third, and said water-right so demanded by said plaintiff to be conveyed being described as follows: that certain ditch and water formerly owned jointly by Jose Ygna-

cio del Valle, Alfredo Salazar, and Prudencia Dominguez, which said ditch is taken out of the Pires creek at the mouth of the canon, and which passes through the lands of Esteban Dominguez, A. Salazar, R. Strathern, and J. M. Horton; that defendants, in consideration that said plaintiff would then or soon thereafter execute and deliver to said Mercedes A. Dominguez the deed of conveyance to lands so described in his complaint, did execute and deliver to said plaintiff a deed to said water-right as above set forth in this finding. (No. 9;) and that at said time plaintiff accepted said deed in full compensation for said agreement to so convey said land, and caused the same to be recorded in Book 12 of Deeds, of Ventura county records, pp. 121, 122."

It is objected that the finding is not within the issues. As the record shows nothing to the contrary, we must presume that testimony was introduced to establish the facts found by this finding. It does not appear that any objection was made by the plaintiff to the evidence that it was inadmissible under the pleadings, as not being within the issues joined. As the record stands, it appears that the cause was tried as if the agreement found was put in issue. Under such circumstances, we cannot permit the objection to be now made that this finding is of matters outside of the issues joined in the cause. It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and, when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below.

The judgment must be affirmed. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

(68 Cal. 644)

HOYT v. NEVADA CO. NARROW-GAUGE R. CO. (No. 9,971.)

Filed February 27, 1886.

**WAREHOUSEMAN—LIABILITY OF RAILROADS FOR NEGLIGENCE.**

Where a judgment is rendered in favor of plaintiff in an action against a railroad company to recover for loss of goods occasioned by its negligence in the course of its duty in its capacity as warehouseman, such judgment, if supported by the evidence, will not be reversed merely because the complaint avers that defendant is liable in its capacity of "common carrier." MYRICK, J., dissenting.

In bank. Appeal from superior court, county of Nevada.

*Searls & Searls* and *A. B. Dibble*, for appellant.

*Cross & Simonds*, for respondent.

By THE COURT. The complaint herein does not entirely fail to aver such negligence or want of ordinary care as would make the defendant liable in its capacity of warehouseman. It contains an averment of negligence of the defendant in storing the goods,—an averment not necessary to an action for failure to perform a carrying contract. The defendant, after alleging that it had possession of the property as warehouseman, averred due care, etc. Here was a

direct issue as to whether the goods were destroyed by reason of the neglect of defendant in storing them, and upon that issue the jury found in favor of plaintiff. No objection was made by defendant at the trial below to evidence tending to show negligence as averred, and the charge of the court was apparently given on the theory that the liability of defendant as warehouseman was the question before the jury. There was no error in the instructions of the court, except in particulars too favorable to the defendant, nor was there any error in refusing the instructions requested by defendant. Under these circumstances we would not be justified in reversing the judgment and order merely because the complaint avers defendant is liable in the capacity of "common carrier."

Judgment and order affirmed.

MYRICK, J. I dissent.

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(69 Cal. 69)

PEOPLE v. SCOTT. (No. 20,121.)

Filed March 8, 1886

**HOMICIDE—MURDER—SELF DEFENSE—HOSTILE DEMONSTRATIONS BY DECEASED.**

Where, on a trial for murder, it appeared that the parties were engaged in gambling, and that defendant bet, and put his money on the table, but subsequently, claiming that he did not have money enough to make good his bet, withdrew the money, upon which deceased, with a knife in his hand, demanded that the money be replaced, and that defendant then drew his pistol, which deceased seized, and in the struggle over it deceased was shot, it was held that instructions of the court to the effect that if defendant could have avoided the necessity of killing the deceased by replacing the money, it was his duty to have done so, are erroneous; and the defendant's withdrawal of the money did not justify any act or demonstration of hostility on the part of deceased, or modify the right of defendant to meet and repel such act or demonstration by adequate and proper means.

In bank. Appeal from superior court, county of Fresno.

*S. J. Hinds* and *J. H. Daley*, for appellant.

*E. C. Marshall*, Atty. Gen., for respondent.

MYRICK, J. The defendant was charged with the crime of murder in killing one Feliz. He was convicted of murder in the second degree, and sentenced to imprisonment for ten years. The homicide occurred at a gambling table, in reference to money being bet at a game of poker. One Higgins sat at the right of Scott, and dealt the cards; Feliz sat at Scott's left. After the dealing Scott bet \$4 on the game, and put the money in the "pot." Feliz, the next in order, bet \$2.50. Scott, remarking to Feliz that he had not money enough, withdrew the \$4 he had bet. Feliz demanded that it be replaced, Feliz having at the time a knife in his hand. Scott drew a pistol. Feliz seized the pistol and in the struggle was shot, whether by design or by an accident, in consequence of the struggle, was for the jury to determine.

At the trial the court below instructed the jury that if the defendant "had agreed to return the money claimed to have been removed by him from the gambling pot, and could have avoided any necessity for killing the deceased by doing so; and that by so doing he would have been in no danger to either life or bodily harm from the deceased; and yet, with full knowledge of this situation, and after he had agreed to return the money, by doing which all danger to him would have been avoided with safety to himself, he shot and killed the deceased in a cool and deliberate manner,—then such killing will be murder;" and the court also instructed the jury that if the defendant prior to the fatal shot, if he fired it, "had agreed to return the money alleged to have been removed by him from the gambling pot, and could have avoided the necessity of killing the deceased by replacing the money back after agreeing to do so, the court instructs the jury that it was his duty to do so; and as between complying with such promise and slaying the deceased, it was his duty to adopt that course which would have prevented and avoided any occasion for the shooting, if that course could have been pursued with safety to the defendant." We are not aware of any rule of law by which the withdrawing of his money by the defendant, or his refusing to replace it, even after a promise so to do, would have justified any act or demonstration of hostility on the part of Feliz, or have at all changed or modified the right of defendant to meet and repel such act or demonstration by adequate and proper means. These instructions implicitly carried the doctrine of "retreating to the wall" to an extent hitherto unknown. The giving of these instructions is manifest error, and for such error the judgment and order are reversed, and the cause is remanded for a new trial.

We concur: SHARPSTEIN, J.; McKEE, J.

ROSS, MCKINSTRY, and THORNTON, JJ. We think the last instruction quoted in the opinion erroneous, and therefore concur in the judgment.

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(39 Cal. 71)

KIMPLE v. CONWAY and others. (No. 9,700.)

Filed March 9, 1886.

1. APPEAL FROM ORDER OF NONSUIT.

An order of nonsuit is not an appealable order.

2. SAME—FINAL JUDGMENT—ENTRY PREREQUISITE TO APPEAL.

An appeal cannot be taken from a final judgment until the judgment has been entered.

3. SAME—NOTICE OF APPEAL—CONSTRUCTION OF.

Where the language of a notice of appeal is that the appeal will be taken "from the order denying plaintiff's motion for a rehearing," the word "rehearing" will be construed as intended for "new trial," if it appears that the court below so understood it.

**4. SAME—JUDGMENT ROLL IN TRANSCRIPT.**

On an appeal from an order denying a motion for a new trial, the judgment roll must be in the transcript.

Department 2. Appeal from superior court, county of San Francisco. Motion to dismiss appeal.

*A. M. Heslip* and *D. L. Smoot*, for appellant.

*W. R. Daingerfield*, for respondents.

THORNTON, J. Motion to dismiss appeals taken by the plaintiff. The notice of appeal is as follows:

"You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the state of California from the judgment or order of nonsuit in the above-entitled cause; also order dissolving preliminary injunction in said cause therein entered in the said superior court on the eighth day of February, 1884, in favor of the defendants in said action, and against said plaintiff, and from the whole thereof; also overruling and denying plaintiff's motion to set aside said judgment or order of nonsuit, and dissolving plaintiff's preliminary injunction, and for granting a rehearing therein, entered in said superior court on the twenty-first of May, A. D. 1884, in favor of said defendants in said action and against said plaintiff."

1. There is no appeal allowed by law from an order of nonsuit, nor does the law allow an appeal from a judgment of nonsuit. If it should be urged that the judgment of nonsuit is the final judgment from which an appeal is allowed, the plain reply is that the transcript does not show that a final judgment has ever been entered. No appeal can be taken from a final judgment until it has been entered. *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43.

2. The transcript contains no order dissolving an injunction. On appeal from that order the order must be furnished in the transcript. Code Civil Proc. § 951.

3. The third appeal mentioned in the notice of appeal, we are of opinion, is an appeal from an order denying a new trial. The notice of appeal states it as an appeal from overruling and denying plaintiff's motion for granting a rehearing. Such a rehearing can signify nothing else than a new trial, for the only mode of rehearing the cause is by a new trial. That the word "rehearing" is used here in the sense "new trial" is borne out by the use of the words in the notice of intention to move for "a rehearing or new trial." These words "rehearing" and "new trial" are there used as synonymous. It further appears that the court below so understood these words, treated this notice as a notice of motion for a new trial, and denied it.

The only remaining objections to the appeals is that the transcript does not contain the complete judgment roll. Of this judgment roll a copy of the final judgment is wanting. On appeal from an order denying a motion for a new trial the judgment roll must be in the transcript. Code Civil Proc. §§ 952, 661.

The appeal from the order of nonsuit and judgment of nonsuit is dismissed. The other appeal will stand dismissed unless appellant shall furnish at the hearing of this cause copies of the papers above designated as wanting in the transcript, certified and attested in the mode required by law. The other questions made on the argument are reserved until the hearing of the cause. They do not properly come before us until such hearing. Ordered accordingly.

We concur: McKEE, J.; SHARPSTEIN, J.

(69 Cal. 73)

CITY AND COUNTY OF SAN FRANCISCO v. DUNN, Comptroller, etc.  
(No. 11, 362.)

Filed March 9, 1886.

STATE AID TO INSTITUTIONS FOR SUPPORT OF AGED INDIGENTS.

Under the provisions of the California constitution for the maintenance of aged indigents, authorizing state aid to private institutions therefor, and providing that when any city and county, county, city, or town, shall provide for the support of aged persons in indigent circumstances, such county, etc., shall be entitled to receive the same *pro rata* appropriation as may be granted to such private institutions, upon appropriations being made to the first mentioned institutions the proviso relative to such other institutions becomes self-executing, and no further legislative action is required to put the same into force.

In bank. Application for writ of mandate.

John L. Love for petitioner.

Langhorne & Miller, for respondent.

MYRICK, J. This is an application for a writ of mandate compelling the respondent to draw his warrant upon the state treasurer for an amount allowed by the board of examiners, on petitioner's behalf, for the support and maintenance of aged persons in indigent circumstances. The first and second provisos of section 22 of article 4 of the constitution, have reference to institutions of a private character, as distinguished from public institutions; and, after authorizing state aid to such institutions, the section proceeds to declare in the third proviso, that whenever any county, city and county, city, or town shall provide for the support of aged persons in indigent circumstances, (and others named,) such county, city and county, city, or town shall be entitled to receive the same *pro rata* appropriation as may be granted to the institutions referred to in the first and second provisos. By the act of March 15, 1883, (St. 1883, p. 380,) the legislature granted aid to the institutions referred to in the first and second provisos, and appropriated \$100 per annum to each person supported and maintained in such institutions. Such appropriation having been made, the third proviso became self-executing as to counties, cities and counties, cities, and towns, and no further legislative action was required. This proviso is a portion of a section

which declares that no money shall be drawn from the treasury but in consequence of appropriations made by law, and qualifies that declaration. It acts of itself as an appropriation upon the other appropriation being made. The evident intent of the constitution is to vest in the legislature the discretion to grant state aid to institutions for support of orphans and indigent aged persons; and, upon the exercise of that discretion, to appropriate to the aid of counties, cities and counties, cities, and towns, for similar purposes, *pro rata* amounts. The demurrer of petitioner to the answer of respondent is sustained. In pursuance of the stipulation of the parties, dependent upon the ruling on demurrer, it is ordered that the writ issue as prayed for.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.

(68 Cal. 549)

PEOPLE v. EDSON. (No. 20,145.)

Filed February 19, 1886.

1. BRIBERY—INFORMATION, SUFFICIENCY OF.

An information for bribery substantially in the language of the statute is sufficient.

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO CHARACTER OF WITNESSES.

An instruction in a prosecution for bribery that the jury might "take into consideration the character, vocation, and profession of witnesses \* \* \* for two purposes: (1) In the consideration of their credibility as witnesses; and (2) where the witnesses are shown to have been active parties to the transaction that is the subject of inquiry. You can consider their character, profession, and vocation in judging of the probability of their being parties to a transaction as has been detailed; you can judge whether these parties would have been likely to offer a bribe to an officer, and, in determining that as a fact, you can judge of the character of the party who, it is alleged, made that approach,"—is erroneous, because it is susceptible of the interpretation that the jury could infer that the witnesses for the prosecution would be likely to approach an officer with a bribe from the fact that they were persons of bad character; and that from such probability of conduct on the part of those witnesses the jury could draw a further inference of the guilt of the defendant.

Commissioners' decision.

In bank.

*J. H. Campbell and W. G. Lorigan*, for appellant.

*Howell C. Moore and Daniel W. Burchard*, for respondent.

FOOTE, C. Edson, the defendant, appeals from a judgment of conviction of bribery, and from an order denying him a new trial. The objection made to the sufficiency of the information is not tenable. Its allegations were substantially in the language of section 68 of the Penal Code. *People v. Markham*, 64 Cal. 157.

*Inter alia*, the court charged the jury as follows:

"It is proper for the jury to take into consideration the character, the vocation, and the profession of witnesses, as well as their appearance upon the stand, for two purposes: One is in the consideration of their credibility as wit-

nesses; and, *secondly*, where the witnesses are shown to have been active parties to the transaction that is the subject of the inquiry, you can consider their character, their profession, and vocation in judging of the probability of their being parties to such a transaction as has been detailed; you can judge whether these parties would have been likely to offer a bribe to an officer, and, in determining that as a fact, you can judge of the character of the party who, it is alleged, made that approach."

It is claimed for the appellant that the foregoing part of the court's charge to the jury was contrary to law, and that they were thereby misled, to the prejudice of the defendant, in this: that the language thus used by the court was susceptible of the interpretation by that body that they could infer that the witnesses for the people, Scossa and Feliz, would be likely to approach an officer with a bribe from the fact that they were persons of bad character; and that from such probability of conduct on the part of those witnesses the jury could draw the further inference of the defendant's guilt as charged. It appeared by abundant evidence that those witnesses were persons of bad character,—the one a prostitute, the other a man who lived with her in a most disreputable relation. The jury may have been misled, as defendant contends, to his injury, by the portion of the charge to which he makes objection, as it is susceptible of the construction he places upon it. We perceive in the record no further prejudicial error. The judgment and order should be reversed, and cause remanded for a new trial.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(68 Cal. 539)

GIBSON v. ROBINSON and others. (No. 8,268.)

Filed February 19, 1886.

1. PUBLIC LANDS—RIGHT TO PURCHASE STATE LANDS—REFERENCE OF CONTEST.  
On a contest of the right to purchase state lands, an order of the surveyor general reciting what had been done by and for each of the parties to give him a right to purchase the land, and that the plaintiff had filed a demand that the contest be referred to the proper court, and then reading as follows: "It is therefore ordered and directed that the said parties be, and they are hereby, referred to the district court of the Twentieth district, in and for Monterey county, for a final determination of said conflicting claims,"—is sufficient as an order of reference of the contest, and gives to the court jurisdiction.
2. SAME—CONTEST OF RIGHT TO PURCHASE STATE LANDS—PLEADINGS IN.  
In a contest to determine the right to purchase state lands, each party is an actor, and must set forth in his pleadings, and show by his proof, that he has strictly complied with the law, and by such compliance has become entitled to become the purchaser of such land.
3. SAME—RIGHT TO PURCHASE STATE LANDS—REFERENCE OF CONTEST.  
A contest to determine the right to purchase state lands may be referred, although a certificate of purchase has been issued to one of the parties, as the title of the state is not divested by such certificate.

v.10p.no.3—13

4. SAME—AFFIDAVIT FOR PURCHASE OF UNSURVEYED TOWNSHIP LAND.

An applicant for the purchase of land in a township the exterior lands of which have been surveyed, but which has not been subdivided, (under the California act of 1869, section 12,) must, in his affidavit for purchase, state that there is no legal claim to the premises other than his own, and that the same are not occupied by any *bona fide* settler, and if he fails to do so he is not entitled to relief in the court; and his application, if defective in such particulars, though made after the passage of the act of March 27, 1872, is not cured by such act, nor by the amendment thereto of April 1, 1878.

Commissioners' decision.

In bank. Appeal from superior court, county of Monterey.

*William H. Webb*, for appellants.

*T. Beeman and S. O. Houghton*, for respondent.

BELCHER, C. C. This is an action to determine a contest as to which of the parties has the better right to purchase from the state the S. E.  $\frac{1}{4}$  of a certain thirty-sixth section of land in Monterey county. In the court below judgment was entered in favor of the plaintiff, and the defendant has appealed. The case comes here on the judgment roll.

The findings show the facts to be as follows: In the year 1854, the north and south exterior lines, and in 1855 the east and west exterior lines, of the township in which the land in controversy is situated were run by the United States surveyor general, but no other steps were taken relative to the survey of the township until the fall of 1874. In the fall of 1874 the township was surveyed and subdivided into sections and quarter sections, as directed by section 2395 of the Revised Statutes of the United States, and on the twenty-seventh day of November of that year the map or plat of the survey was duly approved by the surveyor general and filed in the proper United States land-office. In 1869 one Kellogg settled upon the quarter section in controversy, and placed thereon valuable improvements, consisting of a dwelling-house, barn, corrals, fences, etc. He inclosed and cultivated a part of the land, and resided in the dwelling-house with his family until June, 1871, when he sold and conveyed his improvements and possession to the mother of plaintiff. She at once took possession of the premises, and remained in possession until March, 1873, when she died, leaving the plaintiff her sole heir. From the time of her purchase till her death the plaintiff resided with her on the land, cultivating a part of it and using the balance as a dairy pasture, and ever since her death he has continued in the exclusive possession and occupation of it, claiming ownership as the heir of his mother. On the twenty-first of October, 1870, the defendant filed in the office of the state surveyor general an application to purchase the quarter section, and his application was approved on the twenty-ninth of December, 1873. On the third of March, 1874, he made the first payment, as required by the statute under which the application was made, and the register of the land-office issued to him a certificate of purchase. When he made his application the defendant was not, nor has he ever at any time been, in the possession or

occupation of any part of the land which he sought to purchase. On the thirteenth of January, 1875, the plaintiff filed in the surveyor general's office an application to purchase from the state the south half of the quarter section upon which his buildings and improvements were located, and afterwards, on the fifth of April, 1876, before any action was taken upon his application, and before any intervening adverse rights had accrued or attached, he amended his application so as to include the entire quarter section, of which he was then in the actual possession. All the land in the township was agricultural land, and fit for cultivation, and each of the applicants was qualified and competent to purchase school land from the state.

1. It is claimed for the appellant that the court below had no jurisdiction to hear and determine the case, because no proper and sufficient order was made by the surveyor general referring the contest between the parties to the court for trial. In the complaint it is alleged that the plaintiff demanded of the surveyor general that the contest between the plaintiff and defendant be referred to the proper court for determination, and thereupon that officer did refer said contest to the district court, etc., for adjudication. These averments are not denied by the answer. Attached to the complaint is a copy of the order made by the surveyor general, which, after reciting what had been done by and for each of the parties to give him a right to purchase the land, and that the plaintiff had filed a demand that the contest be referred to the proper court, reads as follows: "It is therefore ordered and directed that the said parties be, and they are hereby, referred to the district court of the Twentieth judicial district in and for Monterey county for a final determination of said conflicting claims." This order was sufficient, we think, to refer the contest, and to give the court jurisdiction of the case.

It is further claimed that there was no contest to be referred, because a certificate of purchase had been issued to appellant, and nothing was left for the surveyor general or register to do, except, when final payment should be made, to prepare and issue to him a patent. In support of this view *Somo v. Oliver*, 52 Cal. 378, is cited. In that case it was held that a contest cannot be made before the surveyor general in respect to the right to purchase land for which a patent has been issued to one of the parties; but that is not in point here. A patent divests the state of its title, but a certificate of purchase has no such effect. It has been held in many cases in this state that a contest may be made where only a certificate of purchase has been issued. *Woods v. Sawtelle*, 46 Cal. 389; *Cunningham v. Crowley*, 51 Cal. 128; *Christman v. Brainard*, Id. 534.

2. When the defendant made his application the land was in the occupation of Kellogg, to whose possession the plaintiff afterwards succeeded. The application was made under the act of March 28, 1868. St. 1867-68, p. 507. Section 52 of that act provides that whenever any resident of this state desires to purchase any portion, not

less than the smallest legal subdivision of a sixteenth or thirty-sixth section of any township in the state, which has been surveyed by authority of the United States, he shall make an affidavit stating, among other things, "that there is no occupation of said lands adverse to any that he or she may have; or, if there shall be adverse occupation, then he or she shall state that the township has been sectionized and subject to pre-emption three months or over; and that said adverse occupant (giving his or her name) has been in such occupation for more than sixty days." Section 12 of the act, as amended in 1870, (St. 1869-70, p. 875,) provides "that in cases where the townships have not been subdivided, but township and other lines have been established so as to clearly show that a tract of land is included in any thirty-sixth section, and the parties applying for the same make affidavit that there is no legal claim to the same other than his or their own, and that the same is not occupied by any *bona fide* settler, the surveyor general may approve such locations without the acceptance of the register of the United States land-office, and the register of the state land-office may issue certificate of purchase for the same."

As the township was not surveyed and sectionized until 1874, it is apparent that defendant's application was not, and could not have been, made under section 52. *Medley v. Robertson*, 55 Cal. 396. Was it made under section 12? If it was, his affidavit must have stated that there was no legal claim to the premises other than his own, and that the same were not occupied by any *bona fide* settler. But there is nothing in the complaint, answer, or findings to show that the affidavit contained such statement, and no presumption can be indulged in that it did. In cases of this kind each party is an actor, and must set forth in his pleadings and show by his proofs that he has strictly complied with the law, and by such compliance has become entitled to purchase the land. If he fails to do this, he can obtain no assistance from the courts. *Woods v. Sawtelle*, 46 Cal. 392; *Cadierque v. Duran*, 49 Cal. 356; *Christman v. Brainard*, 51 Cal. 536; *Lane v. Pferdner*, 56 Cal. 122.

But it is said that defendant's application, however defective it may have been, was made good by the act for the relief of purchasers of state lands, which was passed March 27, 1872. St. 1871-72, p. 587. The first section of that act provides:

"When application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor: provided no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase."

Obviously this had reference to cases where not only the application, but part or full payment, had been made, and the certificate of

purchase issued prior to the time of its passage. *Rowell v. Perkins*, 56 Cal. 226. It was a curative act, and not prospective in its operation; and as the defendant did not make any payment, or receive his certificate till March, 1874, he can claim nothing under it.

Our attention is also called to the act of April 1, 1878, amending the last-named act. St. 1877-78, p. 914. This act cannot affect the case for the reason that it was passed after the plaintiff made his application, and after this action was commenced, and by its terms is not to be "construed to remedy any defect in any application, or the issuing of any certificate, other than that of payments in the wrong county."

When the plaintiff made his application to purchase the land he was in possession, and had a right to purchase it, unless the defendant had acquired a prior and better right to do so. As no such prior and better right was shown, the court properly entered judgment in favor of the plaintiff, and that judgment should be affirmed.

We concur: SEARLES, C., FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(58 Cal. 559)

KLUMPKE v. BAKER and others. (No. 9,098.)

Filed February 25, 1886.

1. HUSBAND AND WIFE—GRANT TO WIFE BY HUSBAND—SUBSEQUENT TITLE VESTS IN WIFE.

A conveyance of land by a husband to his wife by deed, containing the word "grant" in the proper clause thereof, and containing no other words in any part of the deed indicating a less estate, raises the presumption that a fee-simple title was intended to pass, and a subsequent reconveyance to him of a naked legal title from those to whom he had previously executed a deed of trust to secure the payment of a debt does not inure to the benefit of the community, but passes, by operation of law, to the wife by virtue of such former conveyance by the husband to her by grant.

2. TAXATION—ASSESSMENT TO ONE NOT OWNER—VALIDITY OF TAX DEED.

A tax deed to land owned by a married woman will pass no title if it be based upon an assessment to her husband, who does not own the land, nor any interest therein.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

*E. W. Ashby*, for appellant.

*W. C. & Isaac Burnett*, for respondents.

FOOTE, C. The appellant, Klumpke, instituted this action to quiet the title to land which he had bought at tax sale. The court below (the trial being had without a jury) gave judgment for him, but afterwards, on motion of defendants, made and entered an order granting them a new trial, and from that this appeal is prosecuted. That tribunal assigned as a reason for making the order that, as appeared

from the record, the title to the land at the time of its assessment for taxes was in one of the defendants, Mrs. Mary A. Baker, and it had been assessed to George H. Baker. The appellant denies that such was the fact and alleges that the owner of the land was George H. Baker. It appears that the latter obtained title to the land, by deed from the Central San Francisco Homestead Association, in August 3, 1869; that on November 1, 1875, he made a conveyance of it to his wife, Mary A. Baker, who entered into possession thereof, and has so remained ever since, claiming it as her separate property under that deed. That on the second day of May, 1870, he executed a deed of trust conveying the same property to E. W. Burr and B. D. Dean, as trustees for the Savings & Loan Society, the object thereof being to secure the payment to said society of a loan of money made to him; that said money was paid on the seventeenth of August, 1876, and reconveyance under the terms of the trust deed made by said trustees to George H. Baker; that the land was sold for the taxes of the year ending June 30, 1881, and a deed thereof made to the plaintiff by the tax collector on the eleventh of August, 1882. The grounds of the plaintiff's claim to the land under his tax deed were—*First*, that the deed which George H. Baker made to his wife had no greater effect than an instrument of quit-claim, and that therefore no title afterwards acquired by him would inure to her benefit, *second*, that even conceding the deed to be in fact one "granting" the land, the husband's after-acquired title inured to the benefit of the community, and as such was properly assessed to the husband.

It is plain from an examination of the conveyance from the husband to his wife of November 1, 1875, that, containing as it did the word "grant" in the proper clause thereof, without other words in any other part of the deed indicating a less estate, that a fee-simple title must be presumed to have been intended to pass. Civil Code, § 1105; *Mabury v. Ruiz*, 58 Cal. 11-15. And the title which the husband afterwards acquired, coming by a reconveyance to him of a naked legal title from those to whom he had executed the deed of trust to secure the payment of a debt, did not inure to the community, but passed by operation of the law to his wife by virtue of his former conveyance to her by grant. Civil Code, §§ 1072, 1106; *Montgomery v. Sturdivant*, 41 Cal. 290. The land in controversy not having been assessed to its true owner, she being known, but to her husband, who had no title thereto, the tax deed to the plaintiff gave him none. Section 3628, Pol. Code; *Hearst v. Egglestone*, 55 Cal. 365.

The order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(58 Cal. 593)

## THOMPSON v. DOAKSUM, Sr., and others. (No. 9,546.)

Filed February 25, 1886.

## 1. PUBLIC LANDS—POWER OF CONGRESS OVER INDIAN LANDS.

The exclusive right of pre-emption to all Indian lands lying within the territories of the United States is vested in congress.

## 2. PROPERTY—TITLE TO LAND—LAW OF NATIONS AFFECTING.

Title to land is dependent on the law of the nation in the territory of which the land lies.

## 3. PUBLIC LANDS—LAND TITLES IN CALIFORNIA—TREATY OF GUADALUPE HIDALGO.

All lands not held in private ownership by a legal or equitable title, in California, became vested in the United States under the treaty of Guadalupe Hidalgo. In the case of inchoate titles the legal title passed to the United States, which held it subject to the trust imposed by the treaty and equities of the grantee, and the execution of this trust was a political power, to be exercised in such manner as the government might deem expedient.

## 4. SAME—INDIAN LANDS IN CALIFORNIA—PRE-EMPTION.

Where lands in California were held by Indians under title by occupying at the time of the treaty of Guadalupe Hidalgo, unless a claim therefor was presented to the commissioners appointed under the act of the United States of March 8, 1851, within the time limited by such act, the land became a part of the public domain, and as such became open to pre-emption.

## 5. SAME—UNITED STATES PATENT TO LAND—CONCLUSIVENESS OF.

A United States patent to public lands is conclusive evidence of title in the grantee, in any collateral attack thereon, as against those not connecting themselves with the government title.

## 6. SAME—AGREEMENT BY PRE-EMPTOR TO SELL.

An agreement by a pre-emptor of public land to convey to another when he shall receive his patent is void, and not enforceable.

## 7. ESTOPPEL IN PARS—CONTRACT—OPERATION OF.

An estoppel *in pars* can have no greater force or effect in binding parties than would a contract including the very subject-matter urged by way of estoppel.

McKEE, J., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, county of Plumas.

J. D. Goodwin and D. W. Jenks, for appellants.

R. H. F. Variel, for respondent.

SEARLS, C. Action to quiet title to a tract of land in Plumas county. Plaintiff had judgment, and defendants appeal. On the thirtieth day of July, 1878, one D. D. Blunt received from the government of the United States a patent for the land in question, under a homestead filing made in 1873, and the title thus acquired is vested in the plaintiff. The bill of exceptions shows that at the trial defendants offered evidence tending to prove the allegations of their answer numbered fourth, fifth, sixth, and seventh, to which plaintiff objected, which objection was sustained by the court upon the ground that said allegations were, and any evidence tending to prove them was, immaterial, and this ruling is assigned as error.

Defendants are Indians, belonging to a tribe generally known as the "Big Meadows" tribe, and called in their own language the "Nahkomas." The allegations of the answer sought to be sustained

by the testimony offered are, in substance and effect, that at a time unknown to defendants, but which they are informed and believe, and therefore allege, was prior to October 1, A. D. 1492, said lands being vacant, unoccupied, and unclaimed, the ancestors and predecessors of defendants discovered, entered upon, claimed, and occupied said tract of land, and built their dwellings thereon, and that ever since said date defendants and their said ancestors and predecessors have continuously owned, claimed, and occupied said land, and used the same for a village-site and burial-place, and for supplies of water, fuel, etc., according to the customs and necessities of their people; that the right thus acquired has never been ceded, sold, granted, transferred, or relinquished to any nation, government, state, or individual, but remains to them by right of discovery and occupation; that no treaty has ever been made by them with any state or government for their support, maintenance, or education, and no proceedings have ever been had by which their title to said land has been extinguished.

The right or title attempted to be set up by appellants has the merit of age, if no other. The relation of the Indians to the lands they occupied, their title thereto, their power of alienation and the mode of its accomplishment, were questions much discussed in the earlier days of our government. On the discovery of America the leading nations of Europe eagerly sought a foothold upon its soil, and each sought to appropriate all it could discover and occupy. Its great extent afforded an ample field to the ambition and enterprise of all. To avoid conflicting settlements and consequent war with each other, the principle was established that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The relations between the discoverer and the natives were to be regulated by themselves. These relations were to be settled upon the basis of ownership of the soil by the discoverer, with the right of occupancy in the original inhabitants. So long as they remained at peace with the superior race they were entitled to be protected in their occupancy, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country.

Congress has the exclusive right of pre-emption to all Indian lands lying within the territories of the United States. *Johnson v. McIntosh*, 8 Wheat. 543; *Fletcher v. Peck*, 6 Cranch, 142. The United States own the soil, as well as the jurisdiction, of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states; and the Indians have only a right of occupancy, and the United States possess the legal title subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title

of occupancy either by conquest or purchase. Kent, Comm. 257. The *status* of the Indian, and his relation to the land by him occupied, have received careful consideration at the hands of Chancellor KENT, and his views, as expressed in the third volume of his Commentaries, pages 379 to 400, throw much light upon the question under discussion.

It seems, however, unnecessary to discuss the several propositions involved in the foregoing authorities. The subject in the present case is confined to a narrower limit. The title to land is dependent entirely upon the law of the nation in which it lies. Under the English law the king was the original proprietor or lord paramount of all the land within the kingdom, and the sole source of title. We have adopted the same principle, and applied it to our republican government, and the doctrine with us is settled beyond peradventure that valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the predecessors of our government.

The lands within the territorial limits of the state of California were ceded to our general government by the republic of Mexico under the treaty of Guadalupe Hidalgo, of February 2, 1848. By that treaty the United States became vested with the title to all the lands in California not held in private ownership by a legal or equitable title. By the law of nations private rights were sacred and inviolable, and the obligation passed to the new government to protect and maintain them. The term "property," as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. *Teschmacher v. Thompson*, 18 Cal. 12. The treaty operated as a confirmation *in presenti* of all perfect titles to lands in California held under Spanish or Mexican grants. *Minturn v. Brower*, 24 Cal. 644. In the cases of inchoate title—cases where an equity only vested in the claimant—the legal title passed to the United States, which held it subject to the trust imposed by the treaty and equities of the grantee. The execution of this trust was a political power, to be exercised in such manner as the government might deem expedient. *Leese v. Clark*, 18 Cal. 535.

The United States, for the purpose of discharging the obligation resting upon it under the treaty with Mexico, through congress, the repository of its political power, at the second session of the Thirty-first congress, passed an act to ascertain and settle the private land claims in the state of California. Under that act a commission was created for the purpose of hearing and determining the validity of claims to land within the state. The thirteenth section of the act provided "that all land the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have been presented to the commissioners within two years after the date of this act, (March 3, 1851,)

shall be deemed held, and considered as a part of the public domain of the United States." There is no pretense that the claim set up by defendants in their answer was ever presented to the commissioners under this act of congress, and when the time for such presentation expired the land in question must be deemed and taken as having become a part of the public domain.

Again, the patent to plaintiff's grantor is to be taken as conclusive evidence of title in the grantee, as against those not connecting themselves with the government title, in any collateral attack thereon. If defendants had any right to the land, it should have been asserted in the land department pending the application for patent, or by direct proceeding on the part of the government to set aside the patent. There was no error in the refusal of the court to admit the testimony offered.

The second point made by defendants is that plaintiff is estopped by the agreement of his grantor set out in the findings, and of which he had notice at the date of his purchase. It appears that Blunt, the grantor of plaintiff, had filed in the proper United States land-office, in the spring of 1870, his declaratory statement claiming the land in question under the pre-emption laws of the United States, and had received a certificate of pre-emption therefor. That in September, 1870, the agreement set out in the findings was entered into; that thereafter, and some time in 1873, said Blunt changed his pre-emption filing in the Marysville land-office to a homestead filing upon the same premises made in the Susanville land-office, in which district the lands were then situate; and that afterwards, in due time and in 1878, he made the requisite proof, and on the thirtieth day of July, 1878, received a United States patent under his homestead application. If we accord to the novel proceeding had before the justice all that can possibly be claimed for it, viz., that it amounted to a contract on the part of Blunt to convey to defendants when he should thereafter procure a patent, it can avail nothing, as such an agreement by a pre-emptor is void and cannot be enforced at law or in equity. *Huston v. Walker*, 47 Cal. 484; *Damrell v. Meyer*, 40 Cal. 166. An estoppel *in pais* can have no more force or effect in binding the parties than would a contract including the very subject-matter urged by way of estoppel. The findings support the conclusion reached by the court below, and the judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

McKEE, J., dissenting.

Ross, J. I concur in the judgment, on the ground that whatever right, if any, the defendants have to the land in question should have been asserted in the land department of the government pending the application for patent, or by direct proceedings on the part of the government to vacate the patent. So long as the patent exists it is conclusive evidence of title in the grantee and his successors in interest, as against those not in privity with the government.

(68 Cal. 590)

WILSON v. ATKINSON. (No. 9,970.)

Filed February 25, 1886.

1. TAXATION—TAX DEED—EFFECT TO STRENGTHEN TITLE.

Void tax deed is inadmissible to strengthen title by adverse possession, if there is no evidence, or offer of evidence, to show that the person in possession, or his grantor, entered under the deed, or continued to hold adverse possession thereunder.

2. SAME—VOID TAX DEED AND ASSESSMENT, EFFECT AS EVIDENCE OF TITLE.

Where a tax deed is void, the assessment on which it is based cannot be relied on as the basis of any title.

3. APPEAL—BILL OF EXCEPTIONS—PRESUMPTION CONCERNING EVIDENCE.

The presumption is that all evidence tending to explain an objection taken has been inserted in a bill of exceptions, and if, from such evidence, it appears that the trial court erred in ruling against the appellant as to material matter, such error will be ground for reversal.

McKEE, J., dissents.

In bank. Appeal from superior court, county of Placer.

C. A. & F. P. Tuttle, for appellant.

Hale & Craig, for respondent.

By THE COURT. The deed of the tax collector conveyed no title. Inasmuch as the bill of exceptions shows no evidence, or offer of evidence, tending to prove that defendant or her grantor entered under the deed, or continued to hold adverse possession thereunder, the deed cannot be claimed to have been admitted to extend the limits of an adverse possession. The tax deed being void, the defendant could not rely on the *assessment* as translativ of title. *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 367. But as the court below directed a judgment for the defendant, it is suggested that the judgment may have been based on evidence proving an adverse possession. This is true, but it is also true that the court may have ordered the judgment upon the assumption that the defendant had acquired the title by virtue of her deraignment from the purchaser at the tax collector's sale. The Code of Civil Procedure provides that, in a bill of exceptions, "the objection must be stated with so much of the evidence of other matter as is necessary to explain it, and no more." Section 648. When the bill of exceptions reaches us, we must presume that all the evidence tending to explain the objection taken is inserted in the bill. If from such evidence it appears that the court below erred in ruling against the appellant as to a

material matter, this is ground for reversal. We must take it for granted that the judge of the trial court, in settling a bill of exceptions, will see to it that such of the testimony as will sustain his ruling, if any such was given, is incorporated in the bill of exceptions.

Judgment reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

**McKEE, J.** I dissent. The question arising out of the record on appeal in this cause is whether the court below erred in overruling objections made at the trial of the cause to the admissibility in evidence of a tax deed offered by defendant. Defendant's answer contained a special defense of the statute of limitations. On the trial of the issues raised by the answer the tax deed was admissible in evidence for the purpose of showing adverse entry and occupation by the defendant under it for the statutory period, and thus proving title under sections 322, 323, Code Civil Proc. No doubt the deed itself would not be sufficient evidence of an adverse possession. But that is not the question. The question is, was it admissible in connection with other evidence of such a possession? for, as the ruling of the court upon the admissibility of the deed is the only ruling challenged and sought to be reviewed, and as the defendant had judgment, this court is bound to presume that there was sufficient evidence to sustain the judgment.

I think there was no error in admitting the deed in evidence.

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(68 Cal. 554)

**BROOK v. HORTON and others. (No. 8,768.)**

Filed February 25, 1886.

**1. MUNICIPAL CORPORATIONS—VACATING STREET IN CITY—POWER OF LEGISLATURE.**

The state legislature has power to vacate a street in a city, and may therefore properly delegate such power to the city authorities.

**2. SAME—ALTERATION OF STREET—EFFECT OF.**

The alteration of a street or way, by the proper authorities, operates as a discontinuance of those portions of the way which do not come within the newly-assigned limits, and, to have such effect, no special order of discontinuance is essential.

Commissioners' decision.

Department 1. Appeal from superior court, city and county of San Francisco.

*William Levison*, for appellant.

*J. F. Cowdery*, for respondents.

**BELCHER, C. C.** In 1855 an ordinance was passed by the common council of the city of San Francisco, which made it the duty of the city surveyor, acting in conjunction with three commissioners, to be appointed for the purpose, "to furnish, by way of recommendation to the common council, within one month from the date of their ap-

pointment, a plan for the location and dimensions of the streets to be laid out within the city limits west of Larkin and south-west of Johnston streets." Commissioners were appointed, and they and the surveyor agreed upon and reported a plan or map as required. This plan or map was approved and adopted by the board of supervisors of the city and county in October, 1856, and "declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes" in that part of the city named in the ordinance. Subsequently the order and ordinances under which the commissioners were appointed, and the plan or map was prepared, reported, and approved, were ratified and confirmed by the legislature. St. 1858, p. 52. Upon the plan or map so made, which has since been known as the "Van Ness Ordinance Map," was a street running north and south, called Channel street, and having a width of 200 feet. East of Channel street, and running parallel with it at a distance of 132 feet, was a street called Alabama street, and having a width of 80 feet. On the west side of Channel street were three streets, since known as Seventeenth, Eighteenth, and Nineteenth streets, which met it at right angles and terminated at its western margin. On the east side of Channel street were four streets, called Santa Clara, Mariposa, Solano, and Butte streets, which met it at right angles, and terminated at its eastern margin.

In April, 1862, an act was passed by the legislature entitled "An act to establish the lines and grades of streets in the city and county of San Francisco," (St. 1862, p. 407;) and in April, 1864, another act was passed having the same title, and amendatory of the former act, (St. 1863-64, p. 460.) By both acts the city and county of San Francisco was authorized to establish the lines and grades of the streets within the limits of the city, as established in 1851, and for that purpose a "board of city engineers" was created, who were to proceed, as soon as practicable, to survey all the streets, and fix the lines thereof, within the limits named, and to make a map or maps showing thereon the width of every street, and to fix monuments for the preservation of the street lines so established. The maps, when completed, were to be delivered to the board of supervisors, and notice thereof given by publication. Objections to them might then be made by any property owner. If no objections were made, or those made were overruled, and the maps were finally approved and adopted by the board, it was provided that "then such maps and profiles shall stand as the legal and valid official plan of said city to determine the lines of the streets and the grades thereof." Under these acts a map was made which, after due notice, was approved and adopted by the board on the thirtieth of January, 1866, and declared to be "the legal and valid official map of the city and county of San Francisco to determine the lines of the streets and the grades thereof." This map, known as the "City Engineer's Map," was the result of actual sur-

veys, and the streets, as represented upon it, were laid out on the ground, and monuments were placed at the crossing of every street. In June, 1869, the board of supervisors ordered a contract to be entered into with the city and county surveyor to prepare a map of the city and county according to official surveys. A map was prepared, known as the "Humphrey's Map," and in October, 1870, was, by an order of the board, "approved, adopted, and declared to be the legal official map of the city and county of San Francisco."

Upon these two maps Channel street, as represented on the Van Ness ordinance map, does not appear, and in place of it is a narrow street called Treat avenue. Alabama street, as represented on that map, has been removed, and adjoining, and along the east side of the place formerly occupied by it, is Harrison street. Seventeenth, Eighteenth, and Nineteenth streets, instead of stopping at Channel street, are extended to Harrison street. Santa Clara, Mariposa, Solano, and Butte streets, instead of going on to Channel street, are made to terminate at Harrison street. The premises in controversy lie between Channel street and Alabama street, and are a part of Mariposa street, as these streets are laid down on the Van Ness ordinance map. The plaintiff purchased the premises in 1869, and has since occupied and improved them. At the time of this purchase there were upon the premises a dwelling-house and some other improvements, which were erected as early as 1861.

The defendants contend, and the court below held, that when Mariposa street was laid out on the Van Ness ordinance map it was dedicated to the public, and that as so laid out it is still a street dedicated to public use. The plaintiff, on the other hand, contends that that part of Mariposa street which lies between Channel street and Alabama street, as represented on the Van Ness map, was discontinued and abandoned as a street when the engineers' map and Humphrey's map were made and approved. There can be no question that the legislature has competent power to vacate a street in a city, and that it may delegate that power to the municipal authorities of the city. *Polack v. S. F. Orphan Asylum*, 48 Cal. 490. Here the legislature appointed a board of engineers, and directed them to survey all the streets of the city within certain limits, and to fix the lines thereof, and to make maps showing such lines, and it declared that when the maps should be made and approved by the municipal authorities they should stand as the legal and valid official plan of the city. This gave the board of city engineers full power to make the map which they presented, and it constituted that map, when approved, the official map or plan of the city. It was direct legislative authority for the changes made from the Van Ness map, and necessarily operated to discontinue such streets, and parts of streets, as appeared on the Van Ness map, and did not appear on the new map. It has been held in Massachusetts, and we think it must be held here, that an alteration by competent authority of an existing road

or way is a discontinuance of those portions of the way which do not come within the newly-assigned limits and no special order of discontinuance is necessary. *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158; *Bowley v. Walker*, 8 Allen, 21. If this be not the rule, then Channel street, which was laid out on the Van Ness map 200 feet wide, is still a street of that width, though Treat avenue was made to take its place with a width of only 80 feet, and the balance of Channel street may now be covered with valuable improvements.

In our opinion the premises in controversy are not now a part of Mariposa street, and the judgment and order should therefore be reversed, and cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reason given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(68 Cal. 576)

PEOPLE v. McCURDY. (No. 20,065.)

Filed February 25, 1886.

1. CRIMINAL LAW—INFORMATION—COMMITMENT.

Until an examination and commitment by a magistrate, a defendant cannot be presented by information, under the California constitution; but this does not imply that an information will be set aside because of mere irregularities in the preliminary examination and commitment.

2. SAME—ORDER OF COMMITMENT, SUFFICIENCY OF.

A justice's commitment indorsed upon the depositions, and signed by him, and in the language of the statute, as follows: "It appearing to me that the offense in the written depositions mentioned has been committed, and that there is sufficient cause to believe the within-named (giving name) guilty thereof, I order that he be held to answer to the same," etc.,—is sufficient.

3. SAME—PRESUMPTIONS AS TO REGULARITY OF COMMITMENT AND INFORMATION.

On a motion to set aside an information, it is presumed, in the absence of a showing to the contrary, that an order of commitment, providing that the defendant be committed to the custody of the sheriff without bail, was made out and delivered to the proper officer, and that it contained every essential requisite; and if the order committing the defendant to answer was filed on the same day with the filing of the information, the court must also presume in favor of the regularity of the proceedings, in the absence of any showing that the information was not filed subsequent to the commitment.

4. SAME—TRIAL—VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting, a verdict will not be disturbed on the ground that it was contrary to the evidence.

5. SAME—INSPECTION OF ARTICLES BY JURY.

In the absence of objection by either the prosecution or defense, it will be presumed that the consent of the parties was had to an inspection by the jury, in court, after the close of the evidence, and arguments of counsel and instructions by the court, of articles of wearing apparel having a bearing on the case.

6. SAME—CONVERSATION IN PRESENCE OF JUROR.

Where, during the progress of the trial, one of the jurors joined certain persons who were engaged in conversation in reference to the case, whereupon one of the speakers called attention to the fact that a juror was present, and that they must not talk, and the juror replied: "Go ahead; it wouldn't make

any difference,"—it was *held*, on a charge of improper conduct of jurors, that this remark did not evidence on the part of the juror any disposition to act improperly in the case.

7. **HOMICIDE—MURDER—INSTRUCTIONS**

In a criminal trial instructions must harmonize as a whole; and if they fairly and correctly present the law on the issues tried, it will not be ground for disturbing the judgment that a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

8. **SAME—EVIDENCE OF FOOT-PRINTS.**

Evidence of measurements of foot-prints about the body of the deceased, though made two weeks after the homicide, is not incompetent because not made sooner.

9. **CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—WHEN GRANTED.**

A new trial will not be granted on the ground of newly-discovered evidence if no reasons are given why the witnesses could not have been present and testify at the former trial, nor when such evidence would be cumulative, or would only tend to impeach the witnesses of the prosecution.

Commissioners' decision.

Department 2. Appeal from superior court, county of Lake

*Murat Masterson and Ben. P. Tabor*, for appellant.

*E. C. Marshall*, Atty. Gen., for the People.

SEARLS, C. The defendant was accused by information of the murder of one Charles W. Dreher, in the county of Lake, on the fourteenth day of July, 1884, and as the result of a trial was convicted of murder in the first degree, and sentenced to suffer the extreme penalty of the law. The appeal is from an order denying a motion for a new trial, and from an order denying a motion in arrest of judgment.

The information was filed on the thirteenth day of August, 1884. On the eighteenth day of August, 1884, defendant, by his counsel, moved the court to set aside the information upon the ground "that before the filing thereof the defendant had not been legally committed by a magistrate in this: the commitment endorsed upon the depositions herein does not state the name of the person alleged to have been murdered, nor is it dated." The motion was denied. The order indorsed upon the depositions was almost in the exact language of section 872 of the Penal Code, and was sufficient. As the order of the justice provided that the defendant be committed to the custody of the sheriff of Lake county, without bail, we must presume, in the absence of a showing to the contrary, that a warrant of commitment, as required by section 877 of the Penal Code, was made out and delivered to the proper officer, and that it contained every essential requisite. Whereas, in this case, the order committing the defendant to answer was filed on the same day with the filing of the information, we must presume, in favor of the regularity of the proceedings, there being no showing to the contrary, that the information was filed subsequent to the commitment. If such was not the fact, it devolved upon the defendant to show it affirmatively. Filing the order of commitment sufficiently fixes the date,

and it is to be read in connection with the depositions which show that an examination was had. A defendant cannot be presented by information until after an examination and commitment by a magistrate. Const. Cal. art. 1, § 8; Pen. Code, § 809; *Kalloch v. Superior Court*, 56 Cal. 229. The examination and commitment to answer are a prerequisite to the information, but it does not follow that the information will be set aside for mere irregularities in the examination or commitment. If the commitment is legal, it is sufficient. A commitment endorsed upon the depositions, and signed by the justice in the following form, is in the language of section 872 of the Penal Code, and is sufficient: "It appearing to me that the offense in the written depositions mentioned has been committed, and that there is sufficient cause to believe the within named [giving name] guilty thereof, I order that he be held to answer to the same," etc. The warrant of commitment to be delivered to the officer is a different order, and is provided for by section 877, Penal Code.

2. The testimony as to the guilt of the defendant was conflicting to the last degree. Accepting the statements of Fred Dreher, a brother of deceased, as true, there can be no reasonable doubt of the guilt of defendant. If, on the other hand, the testimony of the defendant is to be credited, a well-grounded apprehension is raised that Fred Dreher himself, and not the defendant, was the guilty party. The situation of the parties, the surrounding circumstances, the incentives to the crime, and all of the probabilities, were questions peculiarly within the province of the jury to determine. There being evidence sufficient to support the verdict, we are not at liberty, under the well-established rules of this court, to interfere with such verdict upon the ground that it is contrary to the evidence.

3. At the trial, and after the testimony was closed, and after argument of the cause by counsel and instruction of the jury by the court, one of the jurors asked for the hat of the defendant, worn on the day of the alleged homicide, and also for that of the prosecuting witness, Fred Dreher, the brother of the deceased, and said hats being produced, were received and examined by the jury. The bill of exceptions states that there had been no testimony in reference to the hats, but this is manifestly a mistake, for when the testimony comes to be stated, it appears that after the deceased was missed from camp, and defendant and Fred Dreher had gone in quest of him, and had had a deadly encounter near where the body of deceased was afterwards found, which encounter each charges the other with having commenced, and after both parties had fled from the spot, Fred Dreher was found to have defendant's hat, while his own was afterwards found at the scene of the encounter, and defendant next appeared at Stanton's ranch without a hat. Under these circumstances, it is probable, the jurors desired to examine the hats for evidence in corroboration of the witnesses. No objection was taken by the prosecution or defense to this action, and, in the absence of

objection, we must assume it was by consent of all parties that the hats were submitted to the jury. Had it been otherwise, it is not suggested, and we do not see, how defendant was prejudiced by this action of the court.

4. It is objected that J. A. Tennison, one of the jurors, acted in an improper manner. So far as the record shows, the county clerk and one of the counsel for the prosecution, during the progress of the trial, were engaged in conversation in reference to the case when the juror Tennison joined them, whereupon the county clerk very properly called attention to the fact that Tennison was a juror, and said they must not talk, as "Lane is one of the jurors," to which Tennison replied to the effect that "they might go ahead; it wouldn't make any difference to him." The remark seems to have been a correct one, and in it we fail to see any sufficient evidence of a disposition to act improperly in the case.

5. The only error founded upon the instructions is that "the court erred in instructing the jury to the effect that if they agreed upon the grade of the crime, but did not agree upon the punishment therefor, it was no verdict." It appears from the record that after the jury had retired to deliberate upon their verdict they returned into court for further instructions, whereupon the court proceeded, at the request of the jury, to instruct them that it was possible for them to find any one of four verdicts: "That it is possible you can say: 'We, the jury, find the defendant guilty of murder in the first degree,' if you find that degree without any recommendation; or you can say, secondly: 'We, the jury, find the defendant guilty of murder in the first degree, and recommend that the punishment be imprisonment for life.' In order to do that you find him guilty of murder first; then, if you desire to imprison him for life, you agree upon that, and say so in your verdict." *A Juror.* "Suppose we cannot agree upon that?" *The Court.* "Then it is possible for you to find him guilty of murder in the second degree." The court then proceeded to tell the jury it was possible for them to find the defendant guilty of manslaughter or to find him not guilty. The court also proceeded to inform the jury that they had nothing to do with the penalty following a verdict, except in case of verdict of murder in the first degree; and to say that if they found such a verdict they should then proceed to determine the penalty, and, after answering substantially the same question, it was again put by a juror in this wise: "The point we want to know is this: that if we can't agree upon the penalty, does that fail to bring in a verdict?" To which the court answered: "Yes; that is, in this sense: if you agree upon a verdict of murder in the first degree, then you proceed to determine the penalty, whether you want to recommend imprisonment for life. If you do not recommend imprisonment, then it is capital punishment fixed by law." A juror had previously asked this question: "In case we don't agree upon the penalty, then what?" To which the court answered: "Then it is not a verdict. If you

bring in a verdict of murder in the first degree, then the penalty is death."

The court was not correct in his answer that a failure to fix the penalty would result in no verdict, but in each instance he explained the effect by subsequent statements, so that the jury could not have been misled. It was said in *People v. Doyell*, 48 Cal. 85: "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." When thus taken together, it is apparent from the charge that the jury was properly instructed as to the matter of the penalty attaching to a verdict of guilty of murder in the first degree. *People v. Welch*, 49 Cal. 174.

6. There was no error in admitting the evidence of Swinford and Stanton in relation to foot-prints. The defendant, upon reaching the ranch upon the evening of the homicide, described the place in the canon at which he had left his bloody shirt; and some two weeks after the witness Stanton found the shirt at the spot indicated, and measured the foot-prints found at the point, which corresponded with similar marks found in the vicinity of the body of deceased by Swinford five days after the homicide, and by him measured and found to fit the boots of defendant. These last foot-prints were shown the witness by Green,—a witness who on the day of the homicide trailed the course taken by deceased and his companion from the camp to where the body was found, and who identified the foot-prints as those followed by him at that time. Had the measurements of the foot-prints been made at an earlier day, the value of the information acquired as evidence would no doubt have been greater; but it does not follow that the testimony was incompetent.

7. The affidavits on motion for a new trial fall far short of filling the requirements essential to the end in view. They give no reasons why the affiants could not have been present and testified at the former trial. They show that the only tendency of the evidence, if produced, would be to impeach the testimony of Fred Dreher, a witness for the prosecution. They are cumulative to like testimony for a like purpose introduced on the former trial, and one of them is contradicted, while the other does not seem of importance in the case.

We have been prompted by the gravity of the case to search with diligence the record presented for facts bearing upon the objections. This we have been compelled to do without any formal assignment of errors, without an index to the record as full as it should have been, and without any reference in the brief on file to those portions of the transcript supposed to support the several contentions. No blame is attached to the learned counsel who prepared the very forcible brief for appellant, as it is said he resides in New Mexico, had no oppor-

tunity for access to the record, and only undertook the task of advocating the cause of the prisoner from sympathy in his behalf, and not from any hope of remuneration.

Our examination has failed to develop any sufficient cause to warrant a reversal, and we are of opinion the orders overruling the motions for a new trial and in arrest of judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

(68 Cal. 584)

PEOPLE v. DE WITT. (No. 20,129.)

Filed February 25, 1886.

1. WITNESS—EVIDENCE CONCERNING FORMER TESTIMONY.

If a witness has testified to having been on the witness-stand before, she cannot be compelled to state for what she was called to testify, if such former testimony refers to matter entirely immaterial to the cause.

2. SAME—LEADING QUESTION.

A question put to a witness in the words: "Whom did you see watching around the house?" (the place of the homicide,) is not a leading question.

3. SAME—IMPEACHMENT OF.

Under the California statute the prosecution in a criminal case is allowed to impeach his own witness by proving statements inconsistent with his present testimony given on the trial.

4. HOMICIDE—MURDER—SELF-DEFENSE—INSTRUCTIONS.

An instruction in a prosecution for murder that "the law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of the assailant," is not erroneous as dispensing with the doctrine of apparent necessity, for the reason that a necessity apparently real is real, so far as the conduct in the defendant is concerned.

In bank. Appeal from superior court, county of Colusa.

*T. H. Hart* and *George L. Cutler*, for appellant.

*E. C. Marshall*, Atty. Gen., for the People.

THORNTON, J. The defendant was accused of murder, and convicted of it in the first degree. The court committed no error in sustaining the objection to the question of counsel for defense: "How do you know?" In fairness to the witness, the objection should have been and was, properly sustained. There was no error in sustaining the objection to question of counsel for defense: "What for?" The witness had replied to questions of counsel for prosecution that she was never on the stand as a witness but once before, and that then she was very much excited. The question was then asked by the defense: "What for?" that is, for what was she called to testify. The objection to it was sustained. The question referred to a matter entirely immaterial, and the court committed no error in sustain-

ing the objection to it. We perceive no error in the question asked Dr. Tooley as to the range of the ball. It referred to an immaterial matter. The question put to the witness Vincent: "Whom did you see watching around the house?" (referring to the house where deceased was before and when she was killed,) was not leading. To the question by the court: "Did you see anybody there?" (referring to the space around the house where the homicide was committed,) the witness (Vincent) answered: "I saw some person standing at a distance, but I could not recognize him at the time, and I can't make any statement about who the party was." The court committed no error in allowing Matt. Sullivan and Charles Crockett to testify to the statements made to them by the witness Vincent. The foundation was laid for the introduction of such statements as provided by section 2052, Code Civil Proc., and the prosecution, under section 2049, Code Civil Proc., is allowed to impeach his own witness, by proving statements inconsistent with his present testimony given on the trial. The evidence of Vincent's contradictory statements was in regard to a matter material to the issue, and the statements were of the character allowed to be given in evidence. In *People v. Jacobs*, 49 Cal. 384, section 2049, Code Civil Proc., was not referred to, and though decided in 1874, after the Code went into effect, the case must have occurred prior to its adoption and prior to the enactment of section 2049, Code Civil Proc., above referred to. The questions asked by the prosecution of Vincent in his examination of him were admissible under the rule laid down in Greenl. Ev. (Red. Ed.) § 444a, which is quoted in the opinion of this court in *People v. Jacobs*, 49 Cal. 385.

We find no contradiction in the instructions of the court. The defense objects to the following instruction:

"The law of self-defense is founded on necessity, and, in order to justify the taking of life upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension as a reasonable man that, to avoid such danger, it was necessary for him to take the life of the assailant."

It is urged that the instruction is erroneous for the reason that "it does away with the doctrine that the defendant may act upon appearances that are in fact false. It is further said for the defendant as to this direction: "Self-defense is not founded on necessity unqualifiedly; its necessity may be apparent or real." On examination of the instruction we do not perceive that it does away with the doctrine of *apparent necessity*. When it was said in it that the necessity of taking life must appear to the defendant, the meaning is that it must appear from the circumstances of the homicide. The circumstances may show a real necessity, or one which was apparently real. A necessity *apparently real* is *real*, as far as defendant's conduct is regarded. Either is sufficient to protect defendant. The instruction referred to was consistent with either a real or apparently real ne-

cessity. It did not take away either from the consideration of the jurors. If the instruction in this regard was not sufficiently clear, the counsel for defendant should have asked the court to instruct the jury so as to make it clear to their comprehension. The court committed no error in giving it as it was given. There is nothing in *People v. Flahave*, 58 Cal. 249, inconsistent with what is here said.

The judgment and order should be affirmed.

McKINSTRY, ROSS, McKEE, MYRICK, and SHARPSTEIN, JJ., (*concurring*.) The court erred in permitting witnesses to testify to statements made by the witness Vincent, that he saw the defendant near the house where the alleged homicide was committed on the night of the homicide. *People v. Jacobs*, 49 Cal. 384; *Com. v. Welsh*, 4 Gray, 535. The provisions of the Code of Civil Procedure (sections 2049, 2052) do not authorize the admission of the testimony. But the error was immaterial, since the testimony (including that of the defendant) is uncontradicted that the defendant was present at and near the house where the homicide was committed on the night in question. Upon the other points discussed by him we agree with the views of Mr. Justice THORNTON.

The judgment and order are affirmed.

## SUPREME COURT OF NEVADA.

(19 Nev. 311)

WHITE PINE CO. v. HERRICK and others.

Filed March 22, 1886.

## APPEAL--STATEMENT--EVIDENCE TO SUPPORT JUDGMENT--PRESUMPTION.

A judgment of the district court will not be disturbed as being unsupported by the evidence when the statement fails to affirmatively show that it contains all of the material evidence.

Appeal from a judgment of Sixth judicial district court, Eureka county, entered in favor of defendants.

*H. K. Mitchell*, for appellant.

*Baker & Wines*, for respondents.

BELKNAP, C. J. This appeal is taken from a judgment of nonsuit entered upon defendants' motion. The statement on appeal does not purport to contain all of the evidence adduced at the trial. This court has repeatedly held that a judgment of the district court will not be disturbed as being unsupported by the evidence when the statement fails to affirmatively show that it contains all of the material evidence. *Sherwood v. Sissa*, 5 Nev. 349; *Bowker v. Goodwin*, 7 Nev. 135; *Libby v. Dalton*, 9 Nev. 23; *Sherman v. Shaw*, Id. 148; *Mandlebaum v. Liebes*, 17 Nev. 131; *Caples v. Central Pac. R. Co.*, 6 Nev. 265. In the absence of such showing the court has uniformly indulged the presumption that the facts necessary to sustain the ruling were established at the trial. It results that the question of insufficiency of the evidence cannot be reviewed.

The only subject remaining for examination is the judgment roll, in which no error appears or is claimed. Judgment affirmed.

## SUPREME COURT OF IDAHO.

(2 Idaho [Hasb.] 215)

## SETTLE and others v. WINTERS and others.

Filed March 5, 1886.

## 1. CONTRACT—TIME, WHEN OF ESSENCE OF.

While time is not necessarily of the essence of the contract, in equity, yet it may be made so by the parties.

## 2. SAME—MINING PROPERTY.

Where the character of the property is such that it is liable to sudden fluctuation of value, time is of the essence of the contract. This rule is especially applicable to mining property.

BUCK, J., dissenting.

## Appeal from Second judicial district, Alturas county.

On the nineteenth day of September, 1882, the respondents, who are the plaintiffs herein, entered into a contract in writing with the appellants, who are the defendants herein, as follows:

"This indenture of lease, with privilege of purchase, made and executed this nineteenth day of September, A. D. 1882, by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho territory, parties of the first part, and John Winkelbach, of said Rocky Bar, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, as follows, to-wit: The said parties of the first part, hereby grant, demise, and lease to the said parties of the second part the following described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to-wit: All of that certain quartz-lode mining claim known as the 'Vishnu,' and consisting of an undivided eight hundred feet; also all of that certain quartz-lode mining claim consisting of fourteen hundred (1,400) feet on that certain vein of quartz containing the precious metals known as the 'Idaho,' and being the discovery claims on said Idaho ledge; also twelve hundred (1,200) feet on the Golden or Sierra quartz ledge; also twelve hundred (1,200) feet, more or less, on the Chauncy quartz lode or mine; also the 'Montana Tunnel' and tunnel right. All of the above mines and quartz lode claims commence at Quartz gulch, and run thence easterly towards Dixie gulch,—the 'Vishnu,' eight hundred feet, (800;); the 'Idaho,' fourteen hundred feet, (1,400;); the 'Sierra' or 'Golden,' 1,200 feet; and the Chauncy 1,200 feet, more or less,—and are situated on the north side of Bear creek, on Idaho hill. Also four hundred feet (400) in the Wizzard King quartz lode, commencing at Dixie gulch, and running westerly four hundred feet; also the mill-site at the mouth of Quartz gulch, with blacksmith-shop and cabin thereon. All of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho territory; the 'Vishnu' being highest on Idaho hill, and below it the Idaho, and next below the Golden or Sierra and the Chauncy, being all the group of mines on said Idaho hill south of Quartz gulch. Also that certain engine and boiler, known as the 'Idaho Engine and Boiler,' now lying on said Idaho mill-site: From the twenty-seventh day of November, 1882, on the expiration of a certain lease of the Vishnu and Idaho mines, executed and delivered by the parties of the first part to Thomas Kitto, Charles Davey, and S. Parkinson; or, in the event of the as-

signment of said lease to the parties of the second part before the said twenty-seventh day of November, 1882, then from the date of such assignment until the twenty-seventh day of November, 1883, upon the following terms and conditions:

"The said parties of the second part, so long as they shall deem fit to hold said property, and to mine and extract ore therefrom, and to pay the said parties of the first part one-half of the gross proceeds in manner hereinafter specified; and when the sum of forty thousand dollars (40,000,) shall have been paid, either out of the proceeds of the mine or otherwise, by the said parties of the second part to the parties of the first part,—the said parties of the first part hereby covenant and agree, for themselves, their executors and administrators and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them by good and sufficient deed all of the above-described property, free and clear of all incumbrance, upon such payment, provided the said sum of forty thousand dollars (40,000) shall have been paid on or before the twenty-seventh day of November, 1883.

"And the said parties of the second part hereby covenant and agree to enter upon said properties, and to mine and extract ore from the same so long as they shall find it profitable; to do the work in a proper and workman-like manner, and at their own cost and expense; and to hold and keep said property free and clear of all costs, charge, or lien for the working of the same; and out of the gross proceeds of said mines to pay one-half thereof, as fast as taken out, to said parties of the first part, in the manner hereinafter specified; and, upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of forty thousand dollars (\$40,000) shall have been paid; and in the event of the said parties of the second part, or their assigns, failing to comply with either or any of the foregoing covenants, or any covenant, promise, or thing herein contained, on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above-described property and premises, and every part thereof; and the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of the said premises upon demand by said parties of the first part claiming their right to re-enter.

"It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right, at all times, of inspecting the said mines above described, and all mining operations and work thereon; that the said parties of the second part shall have the right, at any time, to stop work on said mines when they shall find or deem the same unprofitable; that, in working said ores, at each clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled, and all bullion received, to the said parties of the first part; that, in milling said ores so taken from said property, the said parties of the first part, if they so desire, shall have an equal right with said parties of the second part in milling the ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for one-half the gross proceeds, it being expressly understood that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them; and the said parties of the second part are then to dispose of the bullion to the best advantage, and to pay to the parties of the first part one-half of the proceeds thereof in money, currency, or coin; and upon such payment the parties of the first part will credit said purchase price of forty thousand dollars (\$40,000) with the sum so received; and, lastly, that in no event shall the said properties

above described, or any part thereof, be held for any claim, cost, charge, or lien for working the same by the said parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their executors, administrators, and assigns, hereby covenant and agree, to and with the said parties of the second part, their heirs and assigns, to convey, by good and sufficient deed, all of the above-described properties, free and clear of all incumbrances, to them, the said parties of the second part, or their assigns, at any time, upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars, (\$40,000,) either out of the proceeds of the mines or otherwise, on or before November 27, 1883, in the manner hereinbefore specified by the said parties of the second part, or their assigns. And it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real, running with and binding the land.

"In witness whereof the said parties have hereunto set their hands and seals this nineteenth day of September, 1882.

[Signed]

"GEO. F. SETTLE.

[Seal.]

"JACOB REESER.

[Seal.]

"JOHN WINKELBACH.

[Seal.]

"JOHN B. WINTERS.

[Seal.]

"F. GANAHL.

[Seal.]

"Signed, sealed, and delivered in presence of

"SOL. NEWCOMER."

At the same time the following instrument in writing was executed by appellants and delivered to the respondents:

"We, the undersigned, in consideration of the execution and delivery to us of a certain lease with the privilege of purchase of the 'Vishnu' and 'Idaho' mines, and of other property, of even date herewith, by G. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in working said mines to sign the following contract, viz.: 'In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the "Vishnu," "Idaho," and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all rights or claim that I may have in law or equity against the property, or the owners thereof, G. F. Settle and J. Reeser.'

"Witness our hands and seals this nineteenth day of September, 1882.

[Signed]

"F. GANAHL.

"JOHN WINKELBACH.

"JOHN B. WINTERS.

"Signed, sealed, and delivered in the presence of

"SOL. NEWCOMER."

Soon after the execution of this contract the defendants bought in the Kitto lease mentioned in the contract at an expense of about \$5,000, and entered into possession of the properties, and began work thereon, and extracted a large amount of ore.

On the twenty-fourth day of November, 1883, the parties further agreed, in writing, as follows:

"In consideration of the extension of the time of the above instrument until and including December 27, 1883, we hereby consent and agree to take a deed for 1,367 and one-sixth feet of the Idaho ledge instead of 1,400

feet, as covenanted in the above instrument, and to pay interest at one per cent. per month on the balance of the purchase money from now until December 27, 1883, or any time it is paid prior to that date.

"Witness our hands and seals this twenty-fourth day of November, 1883.

[Signed]

"F. GANAHL.

[Seal.]

"JOHN WINKELBACH.

[Seal.]

"JOHN B. WINTERS.

[Seal.]

"In consideration of the above covenants, we hereby extend the time on the within instrument until and including December 27, 1883.

"Witness our hands and seals, this twenty-fourth day of November, 1883.

[Signed]

"GEO. F. SETTLE.

[Seal.]

"By V. S. ANDERSON.

"J. REESER.

[Seal.]"

That prior to the twenty-seventh day of December, 1883, defendants paid over to plaintiffs \$20,075.04, and on the twenty-ninth day of December, 1883, they paid over \$948.96, making in all \$21,024, as one-half gross proceeds of ore taken out before the twenty-seventh day of December, 1883; and they continued to work a portion of the said mines until the service of injunction in this action, on the eleventh day of February, 1884, the same having been commenced February 4, 1884. Defendants extracted ore from said mines during the time they worked it to the amount of over \$42,000. It is claimed by the plaintiffs that they demanded possession of this property in dispute about the twenty-second day of January, 1884. This is denied by defendants. The trial court found that the demand was made.

The plaintiffs brought this action to restrain defendants from further interfering with the premises in dispute, and for an accounting. The defendants answer the same, and also file a cross-complaint, wherein, among other things, they allege the making of the contract; that the same was for the sale of the said premises; that a further extension thereof has been granted; that the same is still in force; and that they have exercised the option to purchase, and paid, as part purchase money thereon, the sum of \$21,024; that they had paid out for the Kitto lease \$5,000, and the further sum of \$34,000 in working and improving the mine; that the defendants were ready, willing, and desirous to complete the contract, and receive the deed, and pay the balance of the purchase money thereon, and had tendered the same to the plaintiffs; that plaintiffs are unable to comply with their part of the contract; that defendants had greatly enhanced the value of the property; that they had expended a large amount of money between the twenty-seventh day of December, 1883, and the commencement of this action; and ask for a specific performance of the contract so far as plaintiffs were able; and that they be enjoined from interfering with the property.

The plaintiffs answer the cross-complaint, and, among other things, deny that defendants exercised any option to purchase. They allege that the work done by defendants was on the "Vishnu" mining

claim; deny that defendants have expended a greater sum than one-half the net proceeds of the ore taken out; deny the enhancing of the value of the mine; and allege that defendants have taken from the mine ore of the value of \$45,000. Plaintiffs aver that the money paid by defendants was for rent or royalty, under the terms of the lease, and not otherwise, and is less than one-half of the proceeds of ores taken out. Plaintiffs deny that the option to purchase has in any manner been extended beyond the twenty-seventh day of December, 1883; and allege that all work done after said date was by the wrongful act of the defendants, and without plaintiffs' consent; and allege that on the twenty-second day of January, 1884, they demanded possession of the property. They allege that they were ready, able, and willing at all times, up to the twenty-eighth day of December, 1883, to comply with the terms of the contract; and that defendants knew plaintiffs' title at the time of making the contract. Plaintiffs further allege that the contract was drawn by one of the defendants, Frank Ganahl, who was an attorney of this court; that there was no other attorney that could be procured; and that said Ganahl represented, promised, and claimed that time was of the essence of the contract; that if the whole sum of \$40,000 was not paid at the expiration of the contract, then defendants would quit, and surrender up possession of the premises; and that he had full knowledge of plaintiffs' title.

The case was tried by the court, and, upon findings of fact and conclusions of law duly filed, judgment was entered in favor of the plaintiffs, from which defendants appeal to this court.

*Bennett, Harkness & Kirkpatrick, (Sutherland & McBride, of counsel,) for appellants.*

*Richard Z. Johnson, (Huston & Gray, of counsel,) for respondents.*

HAYS, C. J. This case has been prepared with great care, and presented with marked ability on each side. It is conceded that the contract upon which this action is based was drawn by one of the defendants, who is a lawyer; that there was no other attorney present, or to be procured, at the time and place where it was drawn. Our first duty is to ascertain what the parties themselves meant and understood by the terms of this instrument; for if the intention is plain and clear, we ought, if possible, to give force and effect to their intent.

Reading this contract, then, in the light of surrounding circumstances, as they existed at the time of drawing and executing the same, we think it must be construed to be a lease with an option to purchase. Did not the defendant who drew the contract so understand it? If not, did he not intend that the plaintiffs, who are unlearned in the law, should? If he did not intend that the plaintiffs should so understand it, why did he begin the instrument, "This indenture of lease with privilege of purchase?" Again, the words are

used, "grant, demise, and lease." Then, the usual reservations of a lease are found,—that the parties of the first part shall have the right to inspect the mines at all times. "The parties of the second part agree to enter upon said properties and extract ore so long as they shall deem it profitable." They are to do the work in a proper and workman-like manner, to keep the property clear of all liens for working the same, and to pay one-half of the gross proceeds of the mine, as fast as taken out, to the parties of the first part; and "upon the expiration of the term hereby granted, to surrender up the said premises, with all the improvements, unless on or before the twenty-seventh day of November, 1883, the said sum of forty thousand dollars should have been paid;" and, "upon failure to comply with any covenant, promise, or thing therein contained by the parties of the second part, to re-enter, take possession," etc.

True, the contract provides that the parties of the first part shall credit the said purchase price of \$40,000 with the sum so received, and there are terms used that might be construed into a contract of sale. But in construing a contract it is contrary to well-settled rules to give it a narrow and technical interpretation, based upon some particular word or clause. The intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent, if possible.

At the time of making the contract, and as a part of the transaction, the appellants executed and delivered to respondents the agreement in writing drawn by defendant Ganahl, in which they mention the contract as a "*lease with the privilege of purchase*," and they also describe themselves as "lessees." Under the circumstances, how must the respondents have considered the contract, and what did the appellants intend to have them understand? We think the natural interpretation of the words used indicates the intention of the respondents to lease the premises in dispute to appellants, and to give to them the right or option to purchase, at any time during the life of said lease, upon the payment in full of the amount agreed upon. It seems to us that it must have been so understood by all the parties. While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties themselves, or by the circumstances of the case. 3 Pars. Cont. 383; 1 Pom. Eq. § 455; *Green v. Covillaud*, 10 Cal. 317; *Utley v. S. N. Wilcox Lumber Co.*, 26 N. W. Rep. 488.

Waterman, in his work on the Specific Performance of Contracts, says:

"Courts of equity formerly paid but little attention to the mere time at which the stipulations of a contract were to be performed, and carried the doctrine of relief, notwithstanding a want of punctuality, to an extravagant length." "But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions."

Equity usually treats time as originally of the essence of the contract when the agreement shows that the parties intended that it should be so regarded. Wat. Spec. Perf. §§ 459, 460; Pom. Spec. Perf. §§ 399, 401; *Grey v. Tubbs*, 43 Cal. 362; *Benedict v. Lynch*, 1 Johns. Ch. 370; S. C. 7 Amer. Dec. 484; *Wells v. Smith*, 7 Paige, 22; S. C. 31 Amer. Dec. 274, and note; Will. Eq. 294; *Phelps v. Illinois Central R. Co.*, 63 Ill. 468.

This rule seems to be well settled, and perhaps the more difficult question for solution now before us is whether time, in this case, has been made essential. The contract provides that it shall run until the twenty-seventh day of November, 1883. It further provides for a conveyance, provided the sum of \$40,000 shall have been paid on or before the twenty-seventh day of November, 1883. It further provides that upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of \$40,000 have been paid. Again, by the terms of the extension of November 24th, which are: "In consideration of the extension of the time of the above instrument for thirty days, or until and including December 27, 1883,"—it would seem that the parties understood and intended to make time essential; for the respondents extend the time until and including December 27, 1883. Each party is specific in fixing the limit of time. Then, again, we may be aided in reaching a correct conclusion by an examination of the character of the property. Real estate is less stable in this country than in England, hence our courts have been more liberal in extending the rule and allowing the special facts and circumstances of each case to have a more controlling influence. Time is usually regarded as of the essence of the contract, both in England and America, where the character of the property renders it liable to fluctuations in value. Pom. Spec. Perf. § 385; Wat. Spec. Perf. 460; Fry, Spec. Perf. §§ 713, 718; *Green v. Covillaud*, 10 Cal. 330; *Jennisons v. Leonard*, 21 Wall. 302; *Goldsmith v. Guild*, 92 Mass. 239; *Christie's Appeal*, 85 Pa. St. 463; 9 Morr. Min. 42.

Fry on Special Performance, § 716, says:

"The nature of all mining transactions is such as to render time essential; for no science, foresight, or examination can afford a sure guaranty against sudden loss, disappointment, and reverses; and a person claiming an interest in such an undertaking ought, therefore, to show himself in good time willing to partake of the possible loss as well as profit."

The same, in substance, has been stated by many other authors. Wat. Spec. Perf. § 460; Pom. Spec. Perf. § 385, and note; Will. Eq. Jur. 292. We think this a wise rule, and that it should be adhered to, especially in a mining country like ours.

It is claimed by the appellants that respondent Reeser extended the time after the twenty-seventh of December, 1883. The trial court

found that no such extension had been made, and the evidence abundantly sustains this finding.

It is also claimed by the appellants that no demand was made upon them by respondents for the possession of the mine. The trial court found the demand was made, and we think the evidence preponderates in favor of the finding.

The appellants offered payment in full, in June, 1884; but this being made long after the commencement of the action, and more than five months after the time limited by the parties for such payment, we think, cannot be available for the reasons heretofore stated.

It has been urged with great force that in this case appellants have paid to plaintiffs more than one half of the agreed price; but it must be remembered that this was all from the *moiety* of ore, or from the proceeds thereof, stipulated to be paid, and must be treated as royalty or rent for the use of the mine. We think, in the case at bar, a different rule should govern than what would be applied in an ordinary sale of real estate. For then, usually, the value of the realty remains the same; and if the grantor is permitted to retain both payment and realty, great injustice might be done. But in the case at bar each ton of ore taken out depletes the mine so much, and in this case it has been exhausted to the amount of over \$42,000. But it is claimed that the appellants have worked the mine at great loss. By the terms of the contract they were at liberty to abandon the work whenever they should deem it unprofitable. Surely it will not be claimed that equity can be invoked to relieve a party from the result of a bad bargain alone.

Many other questions have been discussed, and many points urged by appellants, and, after a careful consideration of them all, we deem it unnecessary to discuss them at length, as we find no error.

Taking into consideration the contract as we construe it, the evident intent of the parties, the nature and character of the property in dispute, and we think the conclusion is irresistible that time is of the essence of the contract, and that a court of equity, with all its great and varied power, cannot decree a specific performance in this case. Judgment is therefore affirmed.

BRODERICK, J., concurring.

BUCK, J., (*dissenting*.) Conceding, for the present, that the contract in question is a lease with the option to purchase, when does the lease go into operation, and when is the option to purchase exercised? It seems to be mutual. It is signed by both parties, and each covenants to do certain acts. As a lease it was partly executed when the defendants entered into possession of the mine. Until the option to purchase was exercised the defendants held as lessees. Whenever they exercised that option by the terms of the instrument they held as vendees. A sale is a contract whereby the ownership

to property is transferred. The sale is completed when the possession and title pass from vendor to vendee. In the case at bar the possession was in defendants, but under the lease the title remained in the plaintiffs, the lessors. When the option to purchase was exercised the title passed from the lessors to the lessees, and their relation changed from lessors and lessees to vendors and vendees. The lessees having possession under an agreement to purchase, at a purchase price of \$40,000, the title passed whenever they exercised their option by paying the purchase price, or any part of it. By the terms of the contract all money paid to the plaintiffs was to be credited on the purchase. Whenever, therefore, a credit was so made a part of the purchase price was paid, and I apprehend the option to purchase was exercised. We cannot call this payment royalty or rent, because, to do so, would contradict the express provisions of a sealed instrument. After the purchase this contract which, up to that time, had operated as a lease, became, in its legal effect, a mortgage to secure the payment of the unpaid purchase price.

It is said that under the terms of this instrument the defendants could abandon the venture at any time. This provision enables us to appreciate the importance of that provision which makes the money paid purchase price. To induce defendants to continue the venture, and not abandon it, the plaintiffs stipulate that every dollar paid shall be a credit in payment of the mine. Can we say, after, under this inducement, the defendants have expended a large amount of money, and paid plaintiffs more than half the amount of the purchase price, that the plaintiffs may alter or disregard the express covenant which has been the inducement to defendant's outlay, and say this \$21,000 which you have paid us is only rent,—you have not yet paid us any part of the purchase money,—you have never exercised your option to purchase? It is claimed that time is of the essence of this contract. The general rule for the purchase of land is that time is not of the essence of the contract. It is claimed, however, that mining property constitutes an exception. Certain text writers are quoted as sustaining this exception. An inspection of these references, however, gives us but two or three ancient English cases. No American cases are cited. If this exception is established by adjudication, it is remarkable that upon this coast, in the 40 years of mining, no such has been adjudicated.

The terms used in the contract specifying the time at which the entire purchase price should be made, and when the plaintiffs might re-enter, cannot be said to determine that time is of its essence; for much stronger language has been adjudicated as meaning differently. Conceding, however, for the argument, that this exception exists in the case of mere options for the purchase of mining property, the question remains, is this contract simply an option? It is admitted that it is unusual in its terms, conditions, and covenants, and that it is difficult to construe. If we attempt to construe it on the theory

that it is simply a lease, with an option to purchase, the terms used will be unnecessary and confusing. If we consider, however, the circumstances of the parties and the property at the time the contract was executed; that, as seems established by undisputed testimony, the plaintiffs wished to sell and the defendants to buy; that nothing whatever was said of leasing the property, and that the word was first used in the contract itself; and interpret this instrument with the light which these circumstances afford,—we may understand the contract to be, what it is alleged to be, more than a mere option to purchase; that it was intended to secure the defendants in an anticipated large expenditure of money, and to enable them to secure the fruit of their labor by finally obtaining the title to the property; and also to secure the plaintiffs, through the covenants to re-enter, against the loss of any portion of the purchase price. If, indeed, it is conceded that it is generally understood by miners that time is of the essence in the mere option to purchase mines, that fact may account for the unusual covenants in the contract, and indicate that they were intended to guard against that very construction, and protect the defendants against it.

In addition to these considerations, in considering the relief sought by plaintiffs in enjoining defendants from occupying the disputed premises, we should remember that the plaintiffs covenant in the contract to give defendants a deed, free and clear of all incumbrances, of the premises in dispute. It is admitted that at the time when they claim the \$40,000 should have been paid, and at the time this action was commenced, the property was, and as far as appears is, yet incumbered by a mortgage of at least \$7,000. It is alleged that, after the alleged termination of the lease, demand was made of defendants for the premises. Was a mere demand sufficient? Should not that demand have been accompanied with an offer to fulfill on their part? This action to enjoin defendants and dispossess them of the premises is, in effect, an action for specific performance against defendants. The plaintiffs rely upon the strict letter of the law. They who seek equity must do equity, and I think the rule applies that a party who seeks specific performance must first be prepared to do equity. This the plaintiffs have never done. It is said that the amount of this incumbrance might have been deducted from the contract price; that the plaintiffs intended to pay this incumbrance out of the purchase price. The defendants were not required in the contract to provide for this incumbrance, nor to pay before it was discharged. Over \$21,000 had already been paid, and yet the incumbrance of \$7,000 was unprovided for.

Are the plaintiffs in position to invoke this hard relief against defendants when they have never offered to perform, and have never been in a condition to fulfill, on their part? I think the suggestion that this incumbrance might have been provided against by retaining its amount by defendants is not tenable. This would involve a new

contract; plaintiffs claim under the written one set out in the complaint. It is suggested that defendants' tender of the balance due, made six months after the time when the lease terminated, is too late. I think equity will regard the plaintiffs' action as asking for specific performance of the contract, as they allege it to be, and defendants' cross-complaint in response thereto as setting up and praying specific performance, as they understand the contract; that the defendants' tender is made in response to plaintiffs' demand, and is sufficient in time. I think this view is fully sustained by the authorities cited upon the argument, but I have not the time to classify them. For these reasons I cannot assent to the opinion of the court.

(2 Idaho [Hasb.] 231)

UNITED STATES *v.* CAMP.

Filed March 5, 1886.

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

The charge to the jury should be brief, explicit, and comprehensive; full enough to protect the rights of the parties, and not so prolix as to confuse. It is not error to refuse to give an instruction which has once been given in substantially the same language.

2. EMBEZZLEMENT—EVIDENCE OF PECUNIARY CONDITION OF ACCUSED.

Evidence of the pecuniary condition of defendant charged with embezzlement immediately prior to the time, and during the time, the offense is alleged to have been committed is competent.

8. CRIMINAL LAW—APPEAL—WHAT CONSIDERED.

Upon appeal in criminal cases the review in this court is confined to questions of law. The guilt of defendant is a matter for the jury, upon legal evidence.

Appeal from Second judicial district, county of Ada.

*Silas W. Moody* and *George Ainslee*, for appellant.

*Fremont Wood*, Asst. U. S. Atty., (*Edgar A. Wilson*, of counsel,) for the United States.

BUCK, J. The defendant was indicted, tried, and convicted at the December term, 1885, of the district court in and for Ada county, Second judicial district, for the crime of embezzlement of \$12,306.36 government money, intrusted to him as assayer at the Boise City assay office, Idaho territory. The evidence establishes the following facts, which are admitted: That defendant took charge of said office on or about June 1, 1883, and was last in charge of the same April 14, 1885. On April 14, 1885, there should have been a balance of \$24,119.78 in his possession of government money received by him during said time. On the last-named date defendant went east, and remained absent until about May, 1885. That during his absence the office and funds thereof were in charge of R. Heurschkel, assistant assayer under the defendant. When the defendant left for the east, and turned the funds over to said Heurschkel, neither counted the money in the presence of the other. Defendant testifies that he counted it himself, and there was in the neighborhood of \$24,000.

Heurschkel testifies that he did not count it; supposed it was all right, and reported the full amount on hand for 16 days thereafter, and until he received orders from Washington to count the same; that upon the receipt of said order he counted the money with witnesses, and found the funds short in the amount charged in the indictment. It was the theory of the defense that Mr. Heurschkel having equal opportunity to embezzle the funds with the defendant, it was impossible to say that defendant took it, and he should have been acquitted.

Upon this point the defendant asked the court to charge as follows:

"The jury are instructed that if they believe from the evidence that the circumstances and testimony point as strongly to some other person or persons as being guilty of taking the funds charged as being embezzled in the indictment number one as they do to the defendant, then the jury are instructed that they must find the defendant not guilty."

The law relied on as the foundation for this charge is quoted from 1 Bish. Crim. Proc. § 1105, to-wit: "If one of two persons is shown to be guilty, but it cannot be distinctly ascertained which one, none can be convicted." It is clear that if it cannot be distinctly ascertained who committed a crime, no one should be convicted. The effect, however, of the charge requested would be to acquit, if the evidence showed two or more were equally guilty. Two might commit a murder, and the evidence show the guilt of both, and yet, because it pointed as strongly to one as to the other, neither could be separately convicted under the charge as requested. To support this charge, appellant refers to *Campbell v. People*, 16 Ill. 17. The charge there asked for was: "If it is *uncertain* from the evidence which one out of two or more persons inflicted a stab, the prisoner must be acquitted, unless there is proof that the prisoner aided or abetted the person ascertained to have killed him." The two charges are quite different. Had the charge requested stated that when the evidence pointed as strongly to one as to the other, and it was uncertain which of the two was guilty, the element of uncertainty would have made it impossible to say that either was guilty, there could be no moral certainty by the jury. We think the charge was properly refused. In appellant's brief many principles of law are enunciated which seem sound, and supported by the authorities cited, but we are unable to see that any error therein was committed by the court.

It is insisted that the court should never refuse an instruction asked by defendant in a criminal case to which there is no valid objection. This proposition involves the question as to the character of a charge to a jury. We apprehend that it should be brief, explicit, and comprehensive; full enough to protect the rights of the parties, and not so prolix as to confuse the jury. A few plain propositions embracing the law as applicable to the facts are all that are required or should be given. *Kelley*, Crim. Law, § 367; *State v. Mix*, 15 Mo. 153; *State v. Floyd*, Id. 349; *People v. Varnum*, 53

Cal. 630; *People v. King*, 27 Cal. 507; *People v. Davis*, 47 Cal. 93; *People v. Dodge*, 30 Cal. 448; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 395. We think the charge fairly states the law of the case, and that no essential feature of the defense was omitted. The appellant assigns as error the admission of certain papers, receipts, and documents of defendant's showing his financial circumstances, and his expenditures at the time he assumed such position as assayer, and immediately prior to and during the time of his holding said position. We think such evidence competent and relevant in a charge on embezzlement. 2 Bish. Crim. Proc. § 327; *Boston & W. R. Corp. v. Dana*, 1 Gray, 83.

In the printed brief the appellant states that said papers were offered and received in bulk, and alleges the same as error. An inspection of the record shows that the objection to their admission was upon the ground of incompetency, and not to the manner of placing them in evidence. We think this objection should have been made at the trial, and cannot be considered for the first time on appeal.

It is urged that the verdict is contrary to evidence. Under our criminal practice act this court cannot consider the weight of conflicting evidence. We may review errors of law in admitting evidence, and, in case of error, grant a new trial, but the question of fact, where there is any legal evidence, is for the jury. *People v. Ah Hop*, 1 Idaho, 698.

We find no error, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

(2 Idaho [Habb.] 236)

#### WYATT v. WYATT.

Filed March 5, 1886.

##### 1. HUSBAND AND WIFE—DIVORCE—ALIMONY, ORDER FOR.

The allowance of alimony to the wife, and counsel fees, pending an action of divorce, rests in the sound discretion of the trial court.<sup>1</sup>

##### 2. SAME—APPEAL—ORDER FOR ALIMONY NOT APPEALABLE.

Under the laws of this territory no appeal lies to the supreme court from an order in an action of divorce for the payment of alimony *pendente lite*, and counsel fees. The parties must abide by the discretion of the court in this regard until a final judgment is rendered in the action. Appeal dismissed.<sup>1</sup>

##### 3. HUSBAND AND WIFE—DIVORCE—ALIENATION OF PROPERTY—RESTRAINING ORDER.

In an action of divorce, a restraining order to save the property pending the litigation may be reviewed on appeal to this court. Order herein examined and affirmed.

Appeal from Second judicial district, county of Ada.

*Huston & Gray*, for respondent.

*Brumback & Lamb*, for appellant.

<sup>1</sup> See note at end of case.

BRODERICK, J. This is an appeal from an order of the district judge, at chambers, awarding to the plaintiff alimony for support pending her divorce suit, and for counsel fees. The first question presented is whether this court has jurisdiction in this class of cases. It is conceded that the court here possesses no power in divorce suits except such as is conferred by statute. Congress has provided that writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court of the territory, under such regulations as may be prescribed by law. The legislature has provided, by section 642 of the Code, that an appeal may be taken from the district courts to the supreme court from a final judgment, and then the mode of appeal is prescribed. Can it be said that an order for alimony *pendente lite* is a final judgment within the meaning of the statute?

It is contended by counsel for the appellant that the order is in the nature of a final judgment, and appealable as such, and, in support of this argument, cite *Sharon v. Sharon*, 7 Pac. Rep. 456. From a careful examination of the *Sharon Case*, it appears that the decision was placed upon the following grounds: (1) That an action of divorce is in the nature of a case in equity; (2) that by the constitution of California the supreme court had appellate jurisdiction "in all cases in equity." The court say: "Appellate jurisdiction in other enumerated cases was and is conferred, but the jurisdiction of this court in an action of divorce, in our opinion, depends on its being, in this state at least, a case in equity." The decision in this case being based on the terms of the constitution conferring upon the supreme court appellate jurisdiction in *all cases in equity*, it was further held that "wherever and whenever a superior court has jurisdiction to take any step or proceeding, or make any order in any case in equity, of that step, proceeding, or order the supreme court has appellate jurisdiction."

There is no provision, either in the organic act or statute of this territory, that corresponds to the constitutional provision of California; hence it does not seem to us that the *Sharon Case* is applicable to the case at bar. Our statute defining the appellate jurisdiction of this court (section 21, Code) reads: "Its appellate jurisdiction extends to a review of all cases removed to it, under such regulations as are or may be prescribed by law, from the final decisions of the district courts." It is said by Judge BOVIER that a "final judgment is one which puts an end to a suit." Certain it is that the order appealed from does not come within this definition. It is an incident to the suit. But it is said in some of the cases that such an order is in the nature of a final judgment. This is the most that has or can be said. That such an order may be said to be in the nature of a final judgment does not convince us that the legislature intended to make it appealable. And as this class of orders is not enumerated among the interlocutory judgments and orders made appealable by

other provisions of the statute, it cannot be claimed that an appeal will lie in this case unless the order is appealable as a final judgment. Whether there should be an appeal in such cases is not for us to determine; but it seems to us that an appeal would, in many instances, defeat the object and purpose of the statute allowing temporary alimony.

Where a wife has good ground for divorce, but has no property in her own right, it is doubtful if she can bind herself personally to pay her counsel. Certainly she cannot bind her husband nor the community property. Since she can neither bind her husband nor the community property, unless she had means of her own, she would be powerless to assert and maintain her right to a divorce if the court could not interfere. From the very necessity of the case, therefore, the court should, on application, award her a reasonable allowance for her support, and a sufficient sum with which to employ counsel. The amount awarded should only go to the necessities of the case, considering all the circumstances and the ability of the husband to pay. In view of the necessity which so often arises, and the obligation of the husband to support the wife, the legislature has, in our judgment, seen proper to leave the matter of temporary alimony to the sound discretion of the trial courts, and by that discretion the parties must abide, in such cases, until a final judgment is rendered. If this has not been wisely done, the law-making power must supply the defect or omission. 1 Bish. Mar. & Div. § 71; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Chase v. Ingalls*, 97 Mass. 524; *Ex parte Perkins*, 18 Cal. 60; 2 Bish. Mar. & Div. § 352; *Cook v. Cook*, 56 Wis. 203; S. C. 14 N. W. Rep. 33, 443; *Bacon v. Bacon*, 43 Wis. 197.

Our conclusions are that the supreme court has no jurisdiction in this case, except in so far as the order restrained the defendant from disposing of his property. From the restraining order an appeal is allowed. After an examination of the complaint, and the affidavits of the plaintiff and defendant used on the hearing when the order appealed from was made, we are satisfied that there was sufficient ground for granting the restraining order to preserve the property until the rights of the parties could be settled and determined by a decree.

Appeal dismissed, except as to the restraining order, and therein affirmed.

HAYS, C. J., and BUCK, J., concurring.

#### NOTE.

The court may decree to a wife suing for divorce her expenses and temporary alimony, whenever she shows her inability to bear the expenses of litigation and living without such aid. The amount of temporary alimony and expenses thus allowed is in the reasonable discretion of the court, and an order will not be disturbed as excessive unless clearly unjust. *Rose v. Rose*, (Mich.) 19 N. W. Rep. 195.

While an action for divorce is pending, the court may, in its discretion, require the

husband to pay any money necessary to enable a wife to prosecute or defend the action, and the action of the court will only be interfered with on appeal in cases of a clear abuse of its discretion. *Cleghorn v. Cleghorn*, (Cal.) 5 Pac. Rep. 516.

Courts will not compel a husband, in a divorce proceeding, to make an allowance to the wife for maintenance and counsel fees unless it is made to appear that she has no property of her own. There is no presumption of law that she has no property. An order for such allowance, where no such showing is made, will not sustain proceedings for the punishment of the husband, as for contempt in disobeying the same. *Ross v. Ross*, (Mich.) 10 N. W. Rep. 193.

In divorce proceedings, temporary alimony should not be denied complainant because of her possessing a small property of her own not derived from her husband. *Merritt v. Merritt*, (N. Y.) 1 N. E. Rep. 605.

In an action for divorce, brought by one claiming to be a wife, alimony *pendente lite*, and an allowance for expenses, will not be allowed, where marriage in fact is denied by answer, until the actual existence of the marital relation is proved or admitted. *Brinkley v. Brinkley*, 50 N. Y. 184.

The granting of temporary alimony and suit money to enable a wife to prosecute her appeal is not a matter of course in the supreme court; and when application is made, the court will look into the record so far as to determine whether the appeal is obviously without merit, and if it is, the motion will be denied. Injury and a meritorious cause of action must appear. *Friend v. Friend*, (Wis.) 27 N. W. Rep. 34.

A judge in vacation, upon the commencement of a suit for divorce, and before the term at which defendant is required to appear to the action, cannot render a judgment for temporary alimony upon an application made for that purpose. *Prosser v. Prosser*, (Iowa,) 20 N. W. Rep. 480.

An order in an action for divorce awarding the wife alimony and suit money, *pendente lite*, to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying a divorce. *Aspinwall v. Aspinwall*, (Neb.) 25 N. W. Rep. 623.

An order made for temporary alimony and expenses is interlocutory, and does not affect the merits of the case. *Ross v. Griffin*, (Mich.) 18 N. W. Rep. 534.

Under a statute providing for an allowance to the wife and attorney's fees to her counsel, proceedings to secure such an allowance are ancillary to the action for divorce, and a separate action cannot be maintained for either. *Clark v. Burke*, (Wis.) 27 N. W. Rep. 22.

Under a statute giving the court power, within its discretion, to make an allowance for counsel fees and expenses to enable a wife to prosecute an action for divorce, the court has no power, after the determination of the suit, to make such an allowance. *Wagner v. Wagner*, (Minn.) 26 N. W. Rep. 450.

Where, in an action for divorce by the wife, the parties, in open court, admit condonation, and ask for a dismissal of the action, in judgment of dismissal the court cannot award the wife's attorney's fees, and order the defendant to pay the same. *Reynolds v. Reynolds*, (Cal.) 7 Pac. Rep. 480.

A widow may not maintain an action against her husband's administrator for fees charged by her counsel for conducting her suit for divorce, pending which the husband died. *McCurley v. Stockbridge*, 62 Md. 422.

## SUPREME COURT OF COLORADO.

(9 Colo. 38)

**Higgins and others, Partners, etc., v. ARMSTRONG.**

Filed February 26, 1886.

1. **MINING PARTNERSHIP—WHEN IT MAY EXIST.**  
When the several owners of a mine co-operate in working it, a mining partnership is thereby established.
2. **SAME—RELATIONS OF LAW TO THAT OF GENERAL PARTNERSHIP—AUTHORITY OF ONE MEMBER TO BIND COPARTNERS.**  
The law of mining partnerships differs in some respects from that of common commercial partnerships; but, upon the point that the acts of one partner in regard to the business bind the copartners, the laws agree.
3. **PRINCIPAL AND AGENT—AGENCY—PROOF OF.**  
An agency may be proved by the habits and course of dealing between the parties.
4. **SAME—RESPONSIBILITY OF PRINCIPAL—PRIVATE INSTRUCTIONS.**  
The principal is responsible for all acts of the agent within the scope of the authority as held out to the world by the principal, although more limited private instructions may have been given, which are unknown to parties dealing with him.
5. **SAME—UNAUTHORIZED ACT OF AGENT—REPUDIATION—RATIFICATION.**  
If an agent act outside of the strict scope of his authority in making a continuous contract for the delivery of an article, and the principal do not, within a reasonable time, repudiate it, but, on the contrary, accept the delivery from time to time, the principal is bound on the contract as made.
6. **SAME—DEFENSE OF IGNORANCE OF CONTRACT.**  
After such acceptances of deliveries the principal, when the contract is in his own office and within reach, cannot plead ignorance of the extent of the terms of such contract.
7. **SALES—MARKET VALUE—PRESUMPTION AS TO LOCAL VALUE.**  
Upon the subject of the market value of charcoal, the question, in a case where charcoal was only mentioned in connection with the locality where the controversy arose, may properly be presumed to have reference to the market value in that locality.

Appeal from district court, Lake county.

*Markham, Patterson & Thomas*, for appellants.*L. C. Rockwell*, for appellee.

BECK, C. J. This is an action brought by the appellee, Armstrong, against the appellants, Higgins and others, composing a partnership or association of persons styled the "American Smelting Company," to recover damages for the alleged violation by said company of a contract to receive and pay for 75,000 bushels of charcoal. The complaint alleges that the contract was entered into and executed on the part of the company, by its agent, T. W. Robinson, who had authority to make and execute the same. It bears date March 24, 1879, and provides that Armstrong shall deliver to said company, at their smelting works in the city of Leadville, 75,000 bushels of well-burned charcoal, at the price of 17 cents per bushel, 10 per cent. of the contract price to be retained by the company until the completion of the contract. The coal was to be delivered in such manner that there should be no less than 500 bushels on the grounds of the com-

pany at any time. The works were not completed until early in June, but the delivery of the coal was commenced on the second day of May, and continued until the twenty-fourth day of June, when Caleb B. Wick, who had been appointed the general manager of the defendants, refused to receive any more coal upon the contract, basing his refusal upon the ground that the coal being delivered was of inferior quality. The defendants, in their answer, denied all the allegations of the complaint, but their main ground of defense was that Robinson was not authorized to execute the contract for the company.

The principal legal questions involved in the case are raised by the eleventh assignment of errors, which calls in question the correctness of the third instruction given on the part of the appellee, Armstrong. In addition to this question, and connected with it, are two vital questions arising upon the record, viz.: Was this contract within the scope of Robinson's agency? If not, was it afterwards properly ratified or adopted as the act of the company?

Robinson was a metallurgist, and had experience in the construction and operation of smelting works. His original employment by the defendants was to erect smelting works for the company, and thereafter to remain as superintendent of the mixing and assaying of ores. Upon his arrival in Leadville, early in February, 1879, he brought two letters from H. I. Higgins, a member of the company, whose authority in the premises is conceded on both sides,—one addressed to J. J. Safely, the other to the Bank of Leadville. These letters are as follows:

Letter to J. J. Safely, dated February 10, 1879:

"Mr. Robinson leaves this morning for Leadville with several men to put up buildings and machinery for smelters. Mr. Robinson will have charge of the erection of all buildings and machinery. We want you to be on the lookout constantly for our outside interests, and when you come across a good thing let us know. Do not buy any lots or other property without consulting us.

JOHN V. AYERS' SONS.

"H. I. HIGGINS, Trustee."

Letter to the Bank of Leadville:

"FEBRUARY 10, 1879.

"This will serve to introduce to you Mr. T. W. Robinson, who goes to Leadville in our interests to erect smelting works. Any drafts of Mr. Robinson on us for money to pay freight on machinery, etc., for material and labor in erecting works, will be paid by us, and we shall be glad to have you honor the same.

JOHN V. AYERS' SONS.

"H. I. HIGGINS, Trustee."

In addition to these letters the defendants Higgins, Otis, and Wick testified that Robinson had no authority other than is expressed in the letters. Robinson being deceased, the parties were deprived of the benefit of his testimony upon the subject of his authority to make the contract in question.

The testimony shows that the company had mining interests at Leadville at and before the time of the arrival of Mr. Robinson, and

that up to the time of his arrival it had an agent there in the person of Mr. Safely. Safely does not appear to have remained there after this date. Robinson appears to have been the only agent representing the company at that place from about February 15th to April 15th succeeding, when the defendant Caleb B. Wick was sent out by the company to take general management and control of all the company's property and business in and about Leadville. A review of the whole testimony affords ground for grave doubts whether the company's letters to Safely and the Bank of Leadville set forth the full scope of Robinson's powers. His power to contract, in the name of the company, for lumber, stone, iron, and other materials necessary in the erection of the smelter, and to hire men and pay freight, is not questioned. But defendants say this was the extent of his authority. The plaintiff's testimony shows that Robinson looked after the company's mining interests during the time of his sole agency, and paid men for prospecting and developing the same. Higgins mentions the fact that the company had mining interests at Leadville. The witness Sanderson says Robinson was paying for prospecting and developing mines, and building the smelting works. The plaintiff, Armstrong, says, when he first became acquainted with defendants they were erecting a smelter and engaged in a mining enterprise. He says he received money from the company through Sanderson, which was paid by Robinson for work performed on the company's mines.

It is substantially conceded that Robinson's agency was not a special one, limited to the supervision of the work of erecting smelting works, nor ending with the completion of the buildings and machinery. His employment was a continuing one. On completion of the smelter he was to take charge of and superintend an important department of the work of smelting ores, which position he in fact filled for several months, as appears from the testimony of Mr. Higgins. The contract made by Robinson with the plaintiff for the delivery of the charcoal, as before stated, bears date March 24, 1879. This was while Robinson was the sole agent of the defendants at Leadville, and while he was looking after all their interests, according to the testimony referred to. It does not appear that any act of Robinson was disavowed, and it is probable that the charcoal contract would have fared the same as the mining transactions had not the price of charcoal greatly declined before the entire amount specified had been delivered. It is clear that if Robinson looked after and expended money for the business interests of the company outside the smelting works and expenses of their erection, either by direction of the company, or by its permission or silence, knowing that he was performing such acts, the company would be properly held liable upon the contract for charcoal. The powers alleged to have been exercised by Robinson, if performed with either the express or implied knowledge of the company, cast upon it the responsibility of holding him out to the world as a general

agent respecting the class of business in which the company was engaged. The rule in such case is that third persons, ignorant of the extent of the agent's authority, will be protected. It was a question for the jury, under proper instructions as to the law, whether or not Robinson was held out as a general agent in respect to the building of the smelter, and the procuring of the supplies to be used in running the same.

Developing mines in the vicinity might well be taken to indicate a design to use ore therefrom in operating the works. A supply of charcoal was just as essential to the operation of the works, under the process adopted, as mineral; for, by this process, charcoal was to be mixed, in certain proportions, with the ores to be smelted. If the facts are as claimed by the plaintiff, the case comes within the principle announced in *Jacobson v. Poindexter*, 42 Ark. 97, that the principal is bound by all acts of the agent within the scope of the authority, as held out to the world by the principal, although more limited private instructions have been given, which are unknown to persons dealing with him. See, to same effect, Whart. Ag. & Ag. § 126. The first coal received for the company under this contract was on the second day of May, 1879, and that was received by the general manager, Caleb B. Wick. We have the testimony of Mr. Higgins that he, Wick, was, at this time, an owner in the company. Mr. Higgins says: "Mr. C. B. Wick, being an owner in our concern, went out to take general charge." Wick continued to receive coal upon the contract, paying therefor according to the terms and conditions specified therein, until the twenty-fourth day of June, when he refused to receive any more for the reason above stated. Upon the fourteenth day of June he addressed to Higgins a letter on the subject, of which the following is a copy: -

"LEADVILLE, June 14, 1879.

"*H. I. Higgins, Esq., Trustee*—DEAR SIR: Mr. Robinson contracted for charcoal,—135,000 bushels at 17 cents per bushel. One party has a written contract to furnish 75,000. He was not responsible, and it was too much of a one-sided contract. I am buying charcoal at from 8 to 10 cents per bushel, making a difference in our contract of some \$6,000. Mr. Otis informed me that Mr. Robinson had no authority to make such contracts.

"Yours truly,

CALEB B. WICK."

Mr. Higgins answered promptly, and declared that the company would not recognize the contract. It will be observed, however, that he did not place the repudiation upon the ground that Robinson *had no authority* to purchase or contract for charcoal. Here are the grounds for the disavowal, in his own words: "Mr. Robinson had no authority to purchase or contract for large quantity of charcoal for our company." The jury might well infer from this reply, taken in connection with the suggestive character of the letter of inquiry from Wick, that Robinson had authority both to purchase and contract for charcoal for the smelter, an implication arising from the re-

ply that he was limited only as to the quantity. Such limitation, however, would be of no force in the absence of notice to the other contracting party.

Wick attempts to excuse himself for receiving and paying for coal upon this contract from May 2d to June 24th upon the plea that he supposed Robinson had authority to make it. That is just what Armstrong supposed, and the indications are strongly to the effect that both the general manager and the vendor had good reason to believe in Robinson's authority. The former, as Mr. Higgins says, *was an owner in our concern*, and having acted as general manager for several days prior to the delivery of any coal under the contract, doubtless supposed that he understood the details of the whole business. A duplicate of the contract was in his office, and he had ample opportunity to examine it, ascertain how the price therein stipulated compared with the market price, and to inquire into the authority for making it. The other party, Armstrong, had known Robinson since his arrival in Leadville. He knew of his contracts, both for the smelter and the mines, and had, according to his testimony, received money paid by him for work done on mines of the company. He judged from the character of his dealings, and the apparent recognition of his agency, that he was authorized to contract for supplies, both to build and to operate the smelter. That an agency may be proved by the habit and course of dealing between the parties is clear upon principle and authority. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 570; *Franklin v. Globe Ins. Co.*, 52 Mo. 461.

We do not lose sight of the fact that one member of the company testified that Robinson had no authority to contract for supplies, and that another member, Higgins, testified that he was not authorized to contract for a large quantity. In connection with this, however, must be considered other testimony in the case, which shows that during the period in which Robinson was the sole representative of the company at Leadville he looked after certain outside matters, all of which, however, had reference in some degree to the general business of the company, and connected with its smelting operations. A person situated as plaintiff was would naturally, therefore, suppose that the agent was duly authorized to contract for all materials in any way relating to the smelting works. It is our best judgment that the jury would have been warranted in finding that the agent Robinson had original authority to contract for the charcoal.

The next question to be considered is that of ratification. If the acts and conduct of the company did not amount to an original authority for the making of this contract by Robinson, has not the company, by its subsequent acts, ratified or adopted it? We have seen that he, Wick, was appointed general manager of the company after the making of the contract, but before anything was done under it, and while it remained executory. He arrived in Leadville after his appointment, some time in April,—probably about the fifteenth

of that month. His powers, as stated by Mr. Higgins in his deposition, were "a general management of all our affairs in Leadville connected with mines and smelters, and he was authorized to make contracts." Mr. Wick himself thus states his powers: "With full power to make all contracts, purchases, and sales." The American Smelting Company was not a corporation, but a copartnership. The testimony, however, does not warrant the inference that it was an ordinary or commercial partnership, since no partnership organization was shown. It appears to have been an association of individuals for the purpose of prosecuting a certain business venture, which was the operating of mines and smelting works at Leadville. It may, therefore, be appropriately denominated a "mining partnership," since the business related to mining projects. It was held in *Charles v. Eshleman*, 5 Colo. 111, that a mining partnership exists where the several owners of a mine co-operate in the working of the mine. Here the several owners in the "concern," as Mr. Higgins calls it, co-operated in carrying on certain mining operations.

The courts hold that a mining partnership is governed by many of the rules relating to ordinary partnerships, but differing therefrom in many important particulars; as, for example, a member may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership. The person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other members consent thereto. Neither does the death of a member dissolve the partnership; new members come into a mining association against the wishes of other members. On the other hand, a mining partner has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. In illustration of this principle, it was held that the law does not imply authority to a member of a mining partnership to execute a promissory note, or to draw or accept a bill of exchange, in the name of the firm; also that the act of employing counsel to litigate the title to a mine does not come within the limited powers vested in a mining partner, but that the powers of the members and managers of such companies are limited to the performance of such acts, in the name of the partnership, as may be necessary to the transaction of its business, or which is usual in like concerns. It is further stated that a partnership may be formed for mining purposes that would possess all the elements of a commercial partnership, and which would subject its members to the same rules and liabilities.

So far as the powers of a partner to bind the firm in the usual course of the partnership business is concerned, it is held that the same principles apply in mining partnerships as in the case of ordinary partnerships. The rule upon this subject, as announced in *Pars. Part. 95*, is that every partner has full and absolute authority to bind all partners by his acts or contracts in relation to the usual business

of the firm, in the same manner and to the same extent as if he held full power of attorney from all of the members, and that this principle rests, not only on universal usage and on universal authority, but on obvious reason and necessity. *Charles v. Eshleman, supra*, and cases cited. In accordance with this principle, it was held in *Manville v. Parks*, 7 Colo. 135, S. C. 2 Pac. Rep. 212, that where a member of a mining partnership purchased articles essential to the carrying on of the business, the debt being created in the necessary and usual course of the business, and within the scope of the partnership venture, the individual member who made the purchase had lawful authority to contract the debt, and to bind his copartners thereby.

The regularity of Robinson's appointment as an agent of the company is not disputed, but the defendants allege that he exceeded his powers in entering into the charcoal contract. They also contend that it was never legally ratified either by Wick, the general manager of the company, or by the company. Whether it was ratified by the company or not depends upon the facts in the case. The regularity of Robinson's appointment as a representative of the company being conceded, it follows, as a necessary sequence, that the company was chargeable with knowledge of the scope of his powers as agent. If, then, Robinson exceeded his powers in assuming to bind the company by the charcoal contract, it became the duty of the company to disavow the act within a reasonable time after notice in order to avoid liability thereon. If the company remained silent for an unreasonable length of time after actual or constructive notice of the existence of an unperformed contract for supplies for its smelting works, with notice that tender of performance had been made by the contractor, Armstrong, and that the charcoal contracted for was being received and paid for by Manager Wick according to the terms and conditions of the contract, such silence would raise a presumption of ratification. We have already alluded to the plenary powers conferred by the company upon Mr. Wick, as agent and manager of the company. It is a well-established rule of law that notice to the agent is notice to the principal of matters falling within the scope of the agency. Power to make contracts for supplies to run the smelter was peculiarly within the scope of Wick's agency. It becomes material, now, to know when the existence of this contract came to his notice.

Mr. Wick admits that he saw a duplicate of the contract in the office of the company, but apparently evades the inquiry, when it first came to his notice. The interrogatories and answers upon this point are as follows:

"*Interrogatory 10.* When did you first learn of the existence of a certain contract or agreement for the purchase of charcoal from the plaintiff, and made with him by Robinson, pretending to act for and represent the defendants? *Answer.* I don't remember the exact time. My recollection is that some time after I arrived in Leadville, in looking over some papers, I found that contract. *Int. 11.* When did you first see the contract? *A.* I saw it as stated in interrogatory 10, and that was the first I ever heard of it."

These answers, taken in connection with his statement of the time of his arrival in Leadville, to-wit, "*in the month of April*," are rather indefinite. The inference from his acts and testimony is that he saw the contract before any coal was delivered thereon. Mr. Armstrong commenced delivering coal to the smelter, as stated, on May 2d. Mr. Wick received the quantity delivered on that day, and continued to receive the coal as it came, the daily average being about 300 bushels, until an aggregate of 13,773½ bushels had been received, and payment made thereon according to the terms and conditions of the written agreement. It is evident, therefore, that he was acquainted with these terms and conditions from the first. One of the conditions was that 10 per cent. of the contract price was to be retained by the company as security for the full performance of the agreement on the part of Armstrong. So far as the evidence shows, no objection was made known to the plaintiff by Mr. Wick that the contract was not a valid one, or that there was any want of authority on the part of Robinson to execute the same, or that the coal was of inferior quality, until the twenty-fourth day of June, at which time Wick refused to receive any more coal upon the contract, alleging as ground of refusal that the coal was of inferior quality. Mr. Wick attempts to explain away the legal effect of his action in receiving a large quantity of coal upon the agreement before disavowing it, by claiming that he did not know of the extent of Robinson's powers as agent of the company, but supposed he had authority to contract for supplies for the smelter. During all this time Mr. Robinson remained in the employ of the company, as is apparent from the testimony of Higgins, who says, in his deposition, that he thinks Robinson remained several months with the company after the appointment of Wick, his duties being to superintend the smelting of ores and the mixing and assaying of ores.

It does not appear from Wick's testimony, or otherwise, that he made a single inquiry of Robinson, or of any member of the company, concerning the authority of Robinson to enter into the contract on the part of the company until the fourteenth day of June. But the significant fact does appear, both from Wick's letter to Higgins and from other evidence, that, when he did commence to inquire about Robinson's authority in the matter, the price of charcoal had declined in the market from 17 cents, the contract price, to 8 and 10 cents per bushel. In view of the relation which Wick sustained to the company, and the knowledge which he possessed by the inspection and custody of the duplicate contract, his failure to inquire into its validity before proceeding to perform it on behalf of the company is not avoided by the explanation offered, that he supposed Robinson had authority, as agent of the company, to make it.

The situation may be illustrated by that of a single principal and a single agent. The agent contracts for articles necessary to the business of the principal, but the contract is outside the scope of the agent's authority. While it remains wholly unperformed and simply

executory, the contract is brought to the notice of the principal. Afterwards, tender of performance is made by the opposite party. Will it be contended that the principal may remain silent, and join the opposite contracting party in performing the contract, until, from change of circumstances, it becomes his interest to repudiate it, and that he may then do so on the ground of want of authority in the agent to enter into the agreement? The case here presented does not differ, in legal effect, from the one supposed, upon the facts appearing in the record before us. An owner in the company, whose relation to it may be found by the jury to be that of a partner, is put in charge of the entire business of the firm. His acts are those of the company. His authority extends to the making of just such contracts as the one in controversy. He has not only notice of its existence, but voluntarily enters upon its performance, and continues in such performance for a period of 50 days. All these things come within the scope of his authority. The agent, then, has notice of the contract, its terms, and conditions, and of the tender of performance. He accepts the coal as delivered on the contract without inquiring into the validity of the written agreement, shutting his eyes to the means of knowledge within easy reach. The law applicable to such facts is that notice of the matters aforesaid to the agent is notice to the company, and that the acts of the agent are the acts of the company. Upon such a state of facts, and after such long silence, the company cannot avail itself of a lack of authority in Robinson to make the contract.

The rule laid down in Whart. Ag. §§ 175-177, is that the principal is bound by all notices coming to the agent relating to matters within the scope of his agency, when such notices would have bound the principal if given directly to himself. Mr. Story announces the principle that notice of facts to an agent is constructive notice thereof to the principal himself where it arises from, or is at the time connected with, the subject-matter of the agency. He puts it upon the ground that, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he does not, still the principal having intrusted his agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise the negligence of the agent, whether designed or undesigned, might operate injuriously to the rights and interests of such party. Story, Ag. § 140. This court has held that notice of facts to an agent, where the matter is within the scope of his agency, affects the principal, though not in fact communicated. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565. Another rule applicable to the present case is that notice to an agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit. *Hiern v. Mill*, 13 Ves. 120; *Ewell's Evans*, Ag. 159.

Counsel for appellant rely upon a doctrine laid down in Story, Ag. § 230 *et seq.*, to the effect that unless the ratification by a principal of the acts, doings, or omissions of his agent be made with full knowledge of all the circumstances of the case, it will not be obligatory upon him, whether the principal's want of knowledge arises from the design, concealment, or misrepresentations of the agent, or from his own innocent inadvertence. This doctrine may be applicable to the case of a special agency, as the employment of an agent for a single transaction, or it may be applicable to completed transactions, but it is not applicable to executory contracts, involving the features of the present case.

Counsel also rely upon the following paragraph, taken from the syllabus of the case of *Combs v. Scott*, 12 Allen, 493:

"Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding upon the principal, must have been made with full knowledge of all material facts, and ignorance of such facts, whether it arises from want of inquiry by the principal and neglect to ascertain the facts, or from other causes, will render an alleged ratification ineffectual and invalid."

Upon these authorities it is contended that the acts of Wick did not operate to bind the company, because he was, at the time, ignorant of the scope of Robinson's authority. We have shown why such ignorance as that claimed by and in behalf of Mr. Wick, does not avail. It was voluntary and willful ignorance, where the means of knowledge was at hand. It was in a case where the person contracting to furnish supplies had relied upon the authority of an agent of the company, who had been permitted, if not authorized, to act generally for the company in relation to the same class of business, the company recognizing his acts by paying the bills so contracted, whereby this party was misled to his prejudice. The case from 12 Allen was in relation to a contract to procure two recruits, and to secure their enlistment in the United States army. It was that of a special agency, confined to a single transaction, and the services were to be performed for a stipulated consideration. It is in no manner analogous to the case before us. Besides, that portion of the syllabus above quoted does not truly state the finding of the court. The rule announced was that the ratification of a *past and completed transaction*, into which an agent has entered without authority, is a purely voluntary act on the part of the principal, and no duty requires him to make inquiries concerning it. But the case further holds that a person cannot be willfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of the ratification of unauthorized acts into which he has deliberately entered. The rule was confined to a *past and completed transaction*, not to an executory contract, where constructive notice of the contract was brought home to the principal before ratification. The company had constructive knowledge that Robinson

had made a contract with Armstrong for supplies, and of the terms and conditions specified therein, before any steps were taken to perform it, either by Armstrong or Wick. This was knowledge of all the essential facts necessary to a ratification by the company. The company failed to disavow the act upon discovery of the existence of the contract, and for an unreasonable length of time after the plaintiff commenced performance on his part. Such long-continued silence gives rise to a presumption of ratification by the company. *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 531; S. C. 2 Colo. 565.

Another view of the case may be predicated upon the theory of Wick's relations as a copartner with Higgins, Otis, Ayer, and other members of the association. He was sued as a member of the firm. His ownership therein was affirmatively asserted in the deposition of Higgins, and it was not positively denied by Wick himself. Although not one of the original members of the association, his interest attached before going to Leadville. When asked, by defendants' counsel, who composed the firm or association, he answered by giving the names of those who were members "in the early part of '79." This answer evidently referred to the original members of the association. Being asked by plaintiff's counsel, on cross-examination, whether there was an association of individuals, of which he was a member, formed for the purpose of transacting business in Lake county under the name of the "American Smelting Company," he answered: "There was an association known as the 'American Smelting Company,' in which I had a conditional interest." What the *condition* was he does not state, nor was there anything in the testimony to show that his interest did not constitute him a member of the company.

On the other hand, Mr. Higgins' testimony tends strongly to show that Mr. Wick was a member. Mr. Higgins stated in his deposition that, upon the completion of the smelter by Robinson, "Mr. Wick, being an owner in our concern, went out to take general charge." Upon the testimony the jury may have found his relations to the company to have been both that of proprietor and general manager. As a member of the partnership, he would be chargeable with notice of the appointment of his agent Robinson, and of the scope of his agency. He would, consequently, be estopped from pleading his ignorance of Robinson's authority as an excuse for the course pursued by him in so long treating the contract as a valid one. Having plenary powers in such matters, both as principal and agent, his acts in carrying out or performing the contract would be equivalent to an adoption of it. Its adoption by Wick would have validated it to the same extent as if originally signed by his own hand instead of the hand of Robinson. Under the same view of Wick's relations to the company, his acts would amount to a ratification of the contract, and be equally binding upon the company. The objection made to the quality of the charcoal which was being delivered under the contract at the time of

Wick's refusal to receive any more thereon does not appear to be supported by the evidence; hence this ground of repudiation cannot be sustained.

The foregoing views are supported by the following rules and citations: "If one partner enter into a transaction with third persons, within the scope of the partnership business, all members of the firm are bound. Pars. Partn. 219. Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is responsible for whatever is done by any of the partners, when acting for the firm within the limits of the authority conferred by the nature of the business it carries on. The principal is bound by the ratification or adoption of transactions by his agent, if the agent had the authority to do the thing which he ratified or adopted. *Whitehead v. Wells*, 29 Ark. 99; *Irwin's Appeal*, 35 Pa. St. 296; *Palmer v. Cheney*, 35 Iowa, 281; *Ewell's Evans*, Ag. 55. The supreme court of Alabama says: "Both principal and the agent may ratify acts of an unauthorized person, and the principal is bound by the ratification or adoption of its agent if the agent had authority to do the thing which he ratified or adopted. *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 539. The distinction made between ordinary partnerships and mining partnerships does not interfere with the above principles in their application to the present case.

The objection urged by appellant to the third instruction given on the part of appellee cannot be sustained, since the instruction contains no fatal error. It is true the instruction is inartificially framed, but the propositions of law contained therein are substantially correct. The first proposition is based upon the theory that the defendants "authorized or permitted" their agent Robinson to act generally for them in and about their business in and about Leadville, and that, acting under such authority, he made the contract in question, and deposited it in a proper place in the office of the company.

The jury is then informed that if such be the facts, and that the company proceeded through their agent Wick, without objection, to perform the contract on its part, they may find either an original authority in the agent or a ratification by the principal. The second proposition relates wholly to a ratification of the act of the agent Robinson by the company, after full information through Wick of the existence of the contract. This proposition is, that if defendants, through Wick, after being fully informed of the making of the contract proceeded to acknowledge its validity, and to act under it by receiving and paying for the coal as delivered, the jury may conclude from such transactions that the company ratified the contract. The legal propositions here laid down do not seem to be in conflict with the views which we have advanced, nor with the authorities cited in support thereof.

The remaining questions presented by the record are of minor importance, and may be briefly disposed of.

The second and tenth assignments of error relate to the measure of damages, and involve one interrogatory and one instruction to the jury. The plaintiff was asked upon the witness stand the following question: "Mr. Armstrong, what was the market price of charcoal on the nineteenth day of June, 1879?" The objection made at the time was a general one. The specific point now made is that the inquiry was not limited to some place in particular. Had this objection been made at the time, it is probable that the question would have been changed so as to obviate the objection raised.

A similar objection was made to the second instruction. It lays down the rule of damages in case the jury find for the plaintiff to be the difference between the contract price and the market value of charcoal at the time the defendants refused to carry out the contract. That the element of place was not mentioned in the question to the witness, and in the instruction to the jury, cannot be held to be error in the present case, for the reason that no other market place than Leadville was referred to in the trial of the cause. It was therefore impossible for the jury to have misunderstood to what place the testimony and the instruction referred. We are also of opinion that the rule of damages laid down by the court was correct.

The fourth assignment of error relied upon was the overruling by the court of appellants' objection to the question propounded to the witness Gerrish requiring him to state whether, during the time the coal was being delivered and used at the furnace, he heard any objections made to its quality. The answer to the question was, "None whatever." It is argued that this answer was misleading to the jury because no relations existed between appellants and the witness Gerrish which required appellants to complain to him or in his presence of the charcoal. The question appears to have been a proper one, considering the qualifications and opportunities of the witness to judge of the quality of the coal delivered. The testimony of Mr. Gerrish shows that he was employed as an expert in the works to assist Robinson in getting them properly started; that he was familiar with the smelting of ores; was by profession a metallurgist, having had, as he states, a good many years' experience in smelting ores with the use of charcoal; and that the duties imposed on him by the appellants were to instruct the men how to mix the ores and coal to make it burn, and how to prepare their furnace in order to make it run. In reference to this process of smelting by the use of charcoal he states that he was the first to introduce it into Leadville. It also appears from the testimony of this witness that he was in the employ of the appellants a sufficient length of time to be able to judge of the character of the charcoal being delivered by Mr. Armstrong. In addition to answering the question that he heard no objection whatever to the coal delivered by Armstrong, he said he had remarked, on seeing some of the coal delivered, that it was the best charcoal he ever saw burned in pits, and that he heard no complaint from Robinson.

Another objection is that the question referred simply to the character and quality of the coal being delivered, whereas the testimony shows that it was also to be free from stones and dirt. The contract was in writing, and in reference to the character and quality of the charcoal it merely says that the appellee was to deliver "75,000 bushels of well-burned charcoal."

The eighth assignment questions the correctness of an instruction given by the court upon its own motion relating to the allowance of interest upon the sum admitted to be due the appellee at the time of the refusal to receive any more coal upon the contract. The jury were instructed to allow interest at the rate of 10 per cent. per annum upon the sum of \$485.47, admitted to be due appellee, but not to allow interest on the sum contested, if they should find the appellee entitled to any other or further sum of damages. This assignment is considered in connection with the sixth assignment of errors, which latter assignment relates to an instruction prayed for by appellants and refused by the court. The latter instruction asked the court to instruct the jury that if the appellants, before suit brought, had tendered the sum of \$485.47, without any restrictions, in payment of the amount then due appellee for charcoal delivered, and that he refused to receive it, no interest should be allowed upon such sum. We have considered the evidence relating to the tender; and the testimony of defendant Wick, alone, shows that no unconditional tender was made. There was therefore no error in giving the appellee's instruction, or in refusing that prayed for by appellants.

We have examined all the errors assigned, and find none of sufficient importance to justify a reversal. The judgment is affirmed.

(9 Colo. 29)

RANDOLPH and another, Adm'r, etc., v. HELPS and others.

Filed February 26, 1886.

1. LANDLORD AND TENANT—LEASE—PROVISION FOR PAYMENT IN CASE OF SALE—SURRENDER.

A provision in a lease looking to the payment for the improvements made by the lessor, in case of sale, does not necessarily imply a surrender of the lease in such an event.

2. CONTRACT—WRITTEN CONTRACT—CONSTRUCTION—RULE.

Where the words of a contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptation.

3. SAME—EVIDENCE—PAROL EVIDENCE—WRITTEN INSTRUMENT.

Parol evidence is admissible to explain or apply the writing, but not to add to or vary its terms.

Error to district court Boulder county.

The complaint alleges that on October 6, 1881, William Stimson was the owner in fee of S. W.  $\frac{1}{4}$ , section 21, township 1 S., range 70 W., in the county of Boulder, Colorado; that on said day he leased the same to the defendants for the purpose of mining for coal, and defendants took possession of the same; that by the terms of the

lease it was provided that if said Stimson should sell the leased premises during the term of the lease, the said Stimson should pay to the defendants the value of all improvements placed upon said premises, and that the defendants should deliver up said premises to said Stimson or his vendee, and that the term of the lease should then terminate; that said Stimson sold the premises leased June 7, 1882, to the plaintiff; that he immediately gave notice thereof to the defendants, and offered to make the appraisement called for by the terms of the lease, and to pay to defendants the value of the improvements made by them; that the defendants refused to receive the value of their improvements and refused to surrender up the possession of the premises, either to Stimson or to the plaintiff, his grantee; that the value of his improvements is \$200; that the said Stimson and the plaintiff are willing and offer to pay for the same; that both Stimson and the plaintiff have demanded, in writing, of the defendants, the possession of the said premises, but defendants refuse to deliver possession of the same, and unlawfully hold over, contrary to the statute; that the use and occupation of the said premises is of the monthly value of \$100; that plaintiff is damaged by the detention \$100 per month. Plaintiff prays for judgment for the restitution of the premises, for \$2,000 for use and occupation thereof, for damages, and for costs of suit. The answer admits the ownership of Stimson, and the leasing of the premises as alleged in the complaint; admits that defendants took possession of the same, and alleges that the lease was in writing; denies that they ever entered into a lease with a provision for a forfeiture in case the lessor should sell the premises, or into any lease containing the stipulations as alleged by the plaintiff; that the term of existence of said lease was not contingent on the sale of the premises by the lessor, and that no sale authorized the plaintiff to obtain possession of the premises, and the lease was never so understood by the parties thereto. \* \* \* Replication by the plaintiff. Trial to the court, and judgment of nonsuit.

*R. H. Whitely, Wright & Griffin and R. D. Thompson* for plaintiffs in error.

*G. Berkley*, for defendants in error.

ELBERT, J. The complaint alleges "that by the terms of the lease it was provided that, if Stimson should sell the leased premises during the term of the lease, the said Stimson should pay to the defendants the value of all improvements placed upon the premises, and that the defendants should deliver up the premises to Stimson, or his vendee, and that the term of the lease should then terminate." The only provision of the lease pertaining to this issue is as follows:

"And it is further stipulated and agreed by the second party that if the first party should sell or dispose of his interest in said premises, said first party shall pay to said second party the appraised value of all the improvements of said second party on said premises, and, in the event of said appraisement, each of the two parties to this contract are to appoint a disinterested man;

and if said two men cannot agree on the price of said improvements, said two men are to choose a third man, and a decision of a majority of said three men is to be the price of said improvements."

Construing this provision according to the settled rules applicable to the case,—collecting the intention from the context and words used,—it cannot be said that it was agreed between the contracting parties that the lease was to terminate upon the sale of the leased premises by the lessor. We find, by its terms, a plain and unambiguous provision for the appraisement of the improvements on the leased premises in case of sale, and for the payment of the appraised value by the lessor; but there is nothing in its terms to the effect that the lessees, in case of sale, shall deliver up the premises to Stimson or his vendee, or that the term of the lease shall terminate. If such was the intention of the contracting parties, they did not express it in their written contract; nor is there any attempt to express such an agreement. It is not the case of an imperfect expression of intention, but one of entire omission, if the intention existed. Payment for the improvements in case of sale may seem unusual, without surrender of the lease, but we cannot say that a surrender is necessarily implied from such a provision. Some very different consideration, known to the parties and unknown to us, may have influenced them. We cannot proceed upon conjecture, and by implication add a provision to the lease which defeats the leasehold estate granted by its express terms. On its face, it is an entire contract, and purports to express fully the intention of the parties.

On the trial below "the plaintiff offered to prove, in support of the lease, that the declared intention of the parties at the time, in using the language set forth in the lease, was that upon a sale of the property by Stimson the possession was to be delivered to Stimson, or his vendee." The language of the offer, taken in connection with the terms of the provision, leaves it in doubt whether the purpose was to explain the language used in the lease, or to show a contemporaneous parol understanding. It was not admissible for either purpose in this case. It is a familiar rule that extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written instrument. The rule applies with greater force to all agreements required by the statute of frauds to be in writing; but, as the effect of a defeasance is claimed for the provision, we apply the rule as to a writing not within the statute of frauds and say: (1) Where the words of the contract are free from ambiguity in themselves, and no doubt or difficulty arises as to their meaning or application, they are to be construed and applied in their plain and general acceptance. Written instruments would be of but little value if evidence *dehors* were admissible to show an intention different from the plain intention expressed by unambiguous words. The language of a contract is the agreed repository of the intention of the parties, and from it, when free from ambiguity, they cannot be allowed to appeal to the less cer-

tain testimony of witnesses. 2 Phil. Ev. \*634. (2) All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves. Parol evidence is admissible to explain and apply the writing, but not to add to it or vary its terms. 2 Phil. Ev. \*666, \*667. In a direct proceeding for that purpose, upon a proper and sufficient showing, a court of equity has the power to reform this instrument in case of fraud or mistake, but, until so reformed, it must stand as the agreement of the parties, and be interpreted by the plain language which they have used.

The judgment of the court below is affirmed.

(9 Colo. 60)

CAMPBELL, Intervenor, and others v. COLORADO COAL & IRON Co.

Filed March 1, 1886.

1. PARTNERS—BUSINESS CARRIED ON IN SEPARATE PLACES BY SAME PARTIES—EFFECT IN LAW.  
The fact that the same parties were carrying on business as partners in two different places, and under different partnership names, does not prevent their being considered in law but a single partnership.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS—PROPERTY OUTSIDE OF STATE.  
Voluntary assignments for the benefit of creditors, which are valid in the state where the debtors reside, affect generally the debtors' personal property the *situs* of which is in other states.
3. SAME—COLORADO ASSIGNMENT LAW—WORD "ESTATE."  
The word "estate" used in section 68 of the General Statutes means all of the debtors' property, both real and personal, not exempt from execution, and hence the statute was designed by the legislature to cover general assignments.
4. SAME—PREFERENCES AND PARTIAL ASSIGNMENTS.  
Section 68 of the General Statutes should not be construed as prohibiting or interfering with the making of partial assignments.
5. SAME—EFFECT OF ASSIGNING DEBTORS' MAKING PRIOR INSTRUMENTS OF CONVEYANCE.  
The fact that an insolvent debtor clearly attempts to evade the statute by preferring certain creditors in separate transfers or instruments conveying portions of his property at or about the time he makes a general assignment may be a reason for avoiding the preferences so given, but not for declaring the assignment itself invalid.
6. SAME—EFFECT OF ONE DEBTOR BEING A PARTNER IN A CREDITOR FIRM.  
The fact that one of the creditor beneficiaries of an assignment is a firm of which one of the assigning debtors is a member will not defeat the assignment.

Error to superior court, city of Denver. On petition for rehearing. See S. C. 7 Pac. Rep. 291.

The cause was tried upon an agreed statement of facts. This statement is, in brief, as follows:

Ferdinand Jensen and William M. Bliss were engaged as partners in mercantile business at Denver, Colorado, and Deadwood, Dakota. The firm name, at the former place, was Jensen, Bliss & Co.; at the latter, it was Jensen & Bliss. At the hour of 7 o'clock p. m., October 1, 1884, Jensen, Bliss & Co. made an assignment of certain claims, demands, notes, and accounts,

aggregating in value about \$13,500, to one Metcalf, for the purpose of paying or securing a *bona fide* firm indebtedness of \$20,000. At the same time, and for a like purpose, Bliss also executed to Metcalf a trust deed upon certain realty, the title of which was in the former's name alone. At the hour of 9 P. M. of the said October 1st the firm executed and delivered to R. A. Campbell, as assignee, an assignment of all the partnership property, "of every name and nature within the state of Colorado," for the equal benefit "of each and every of our creditors in both branches of our said business and everywhere." Prior to this, and about September 20, 1884, the attorney of the firm was directed to draw both of said assignments. The one to Metcalf was prepared by said attorney on said September 20th, and the other four days later, to-wit, September 24th. On the twenty-ninth day of September, without the knowledge of Metcalf, an entry was made upon the books of the firm of the transfer to him of the choses in action mentioned in the written assignment made for his benefit. At the time of the assignment to him, Metcalf knew that the assignment to Campbell was about to be made; but the assignee, Campbell, was ignorant, when he accepted the trust, of the Metcalf transaction. On the second and fourth days of October, 1884, the firm of Jensen & Bliss executed and delivered mortgages to certain of their Deadwood creditors upon their Deadwood property. Though the nature of this property is not specifically stated in the record, yet we are sufficiently advised to say that a large part of it was personalty. During all of the preceding transactions, both nominal firms were insolvent. November 8th following, plaintiff, the Colorado Coal & Iron Company, being a *bona fide* creditor of Jensen, Bliss & Co., brought an action against the firm for the amount of its claim, and caused a writ of attachment to be levied upon the property in the hands of Campbell as assignee. The latter intervened in this attachment proceeding, claiming the property by virtue of the assignment aforesaid.

Judgment was rendered against the intervenor, and in favor of plaintiff, whereupon the former sued out this writ of error. The principal question presented for determination related to the validity, under all the foregoing circumstances, of the assignment to Campbell.

*E. O. Wolcott, A. E. Pattison, and J. F. Vaile*, for plaintiffs in error.

*J. D. Thompson and J. M. Waldron*, for defendant in error.

HELM, J. We are now satisfied that upon one of the material questions considered in the opinion of the court, written by myself, and filed in this cause, an erroneous conclusion was reached. That opinion is accordingly withdrawn. The views therein expressed which are still adhered to, as well as those resulting from our further investigation upon this rehearing, are embodied in the following opinion, which will be substituted therefor.

1. Since the persons constituting both the firms mentioned in the agreed statement were the same, and they were engaged in carrying on the same business in both places, there was in law but a single partnership. The fact that there were two partnership names is of no importance, and "the assets of both nominal firms are equally applicable to the payment of all the creditors." *In re Williams*, 3 Woods, 493, and authorities there cited. We shall, therefore, in the discussion of this case, adopt the theory that there was but a

single partnership, which was engaged in business at the two places mentioned; and that the Colorado creditors and the Dakota creditors were equally interested in the partnership assets, whether at Denver or Deadwood.

2. It may be considered a settled doctrine that voluntary assignments for the benefit of creditors which are valid in the state where the owners reside, will be held to pass personal property included, the *situs* of which is in other states. The assignees take title thereto unembarrassed by the claims of creditors, residing where the property is situate, who have not obtained a prior lien by levy of attachment or other process. We are not here concerned with the qualification of this doctrine recognized by some of the decisions, where the "foreign assignment is repugnant to the policy or laws of the state in which domestic creditors have attached property located therein." It follows from the foregoing propositions of law that Jensen, Bliss & Co. might have included in the assignment to Campbell their Dakota personal property also. In view of this fact, and of the matters set forth in the agreed statement, we proceed to briefly examine the law governing assignments for the benefit of creditors in Colorado.

3. Section 68, Gen. St., reads as follows:

"Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors, the assignee named in the deed of assignment, appointed or selected, shall be required to pay in full, from the proceeds of the estate, all moneys *bona fide* due to the servants, laborers, and employes of such assignor for their wages accruing during the six months next preceding the date of such assignment, but to exceed, in no event, the sum of fifty dollars to any one person then remaining unpaid. All the residue of the proceeds of such estate shall be distributed ratably among all creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding."

We think that the word "estate," used in this statute, means all of the debtor's property, both real and personal, not exempt from execution, and hence that the statute was designed by the legislature to cover general assignments. We are satisfied that in this respect no distinction can fairly be drawn between section 68 and the statutes of other states on the subject, wherein the expression "general assignment" occurs. Therefore, in our judgment, an important question presented is, are partial assignments prohibited or interfered with by this provision? To satisfactorily answer the foregoing question it is necessary for us to look beyond the statute, and consider the common law. We use the term "common law" in its broader sense, as including those doctrines of equity jurisprudence which have not been expressed in legislative enactments.

4. A fundamental principle underlying this subject is, that, so long as the debtor retains dominion over his property, in the absence of statute and of fraud, he may do with it as he pleases. He may

transfer the whole of his estate in payment or in security of a single *bona fide* debt. He may assign, mortgage, or otherwise incumber his estate, or a part thereof, in favor of some of his creditors, excluding the rest; or he may make an assignment for the benefit of all his creditors, and therein give preferences to a selected few. It is only when, either by a general assignment or otherwise, the debtor has parted with the dominion over his property, that, in the absence of statute or fraud, the foregoing privilege is forfeited. Bur. Assign. (3d Ed.) §§ 160, 161, and cases cited; *Lampson v. Arnold*, 19 Iowa, 479, and cases cited; *Worman v. Wolfersberger's Ex'rs*, 19 Pa. St. 59; 2 Kent, Comm. (12th Ed.) 532, and cases cited, as to assignments. While, at first, this common-law doctrine may seem somewhat inequitable, yet upon reflection it clearly appears to be supported by at least one consideration of the most weighty import. To hold that debtors may not give preferences among their *bona fide* creditors, so long as they control their property, would greatly embarrass the transaction of nearly all kinds of business. Some of the authorities go so far as to say that such a rule would prevent the carrying on of business altogether. "While a man retains dominion of his property, he may incumber and convey it as he pleases, if not directly forbidden by law, and prefer such creditors, by payment or transfer, as he chooses; and if it were not so, an individual could not get along in his business." *Blakey's Appeal*, 7 Pa. St. 449. "If, while a man retains his property in his own hands, the right of giving preferences should be denied, he would so far lose the dominion over his own that he could not pay *anybody*, because whoever he paid would receive a preference." *Tillou v. Britton*, 9 N. J. Law, 120. "Any enactment which takes away the right of a debtor to prefer them [creditors] would produce a sudden change, so extensive in all business transactions that its policy is somewhat questionable." *Worman v. Wolfersberger's Ex'rs*, *supra*.

Recurring to the question already propounded: Does the statute under consideration so far change the foregoing common-law principle as to prohibit preferences in favor of chosen creditors by means of *partial* assignments? If the expression "his or its estate," therein contained, means, as we have concluded it does, all of the debtor's property not exempt from execution, then the statute may read: "Whenever any person or corporation shall hereafter make a general assignment of his or its estate for the benefit of creditors," etc. The general rule is that statutes in derogation of the common law are to be strictly construed. Certainly a proper regard for this rule forbids the enlargement of a statute by construction, so as to include common-law principles not clearly within its language or spirit. In so far as the section before us prohibits preferences in general assignments, it unquestionably modifies and restricts the common law; but if the legislature had intended to further change the common law, and deny preferences through *partial* assignments, it should

nave said so, as like bodies elsewhere have done, in unequivocal language. The courts should not have been left to infer this meaning from the expression used.

In Iowa a statute reading as follows, "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims,"—was held not to inhibit the making of partial assignments. The court say: "Nor does the statute prohibit or interfere with the right of any debtor as it existed prior to the statute to make a partial assignment." *Lampson v. Arnold, supra; Davis v. Gibbon*, 24 Iowa, 257.

A similar construction was placed upon the following Alabama provision: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors over all remaining creditors of the grantor, shall be and inure to the use and benefit of all the creditors of the grantor equally." *Stetson v. Miller*, 36 Ala. 642.

An act of congress provided, in effect, that when "a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors," claims of the United States should be preferred. The supreme court denied the preference where a partial assignment only was made. That court, speaking through Chief Justice MARSHALL, says: "Had the legislation contemplated a partial assignment, the words 'or part thereof,' or others of similar import, would have been added." *U. S. v. Hove*, 3 Cranch, 73; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *U. S. v. Howland*, 4 Wheat. 108.

The legislature of New Hampshire adopted a statute providing, in substance, "that no assignment made for the benefit of creditors of any debtor so assigning his property shall be valid in law except the same shall provide for an equal distribution of all the debtor's property among his creditors, in proportion to their respective claims." The court say with reference thereto:

"It never could have been the intention to prohibit a debtor from assigning any particular property he might possess for the purpose of paying any particular debt or debts he might owe. Such a prohibition would be absurd, so long as any creditor or creditors are permitted, as they are by our laws, to attach any property of the debtor and thus apply it to the payment of their debts, without the consent of the debtor." *Meredith Manufacturing Co. v. Smith*, 8 N. H. 347.

Again, on the same subject:

"We are of opinion that the assignments intended by the statute are general assignments, purporting to convey all the debtor's property to trustees for the benefit of *all* his creditors," etc. *Low v. Wyman*, 8 N. H. 536.

In Vermont there was enacted a statute providing that all general assignments thereafter made for the benefit of creditors should, as to

such creditors, be null and void. With reference to this statute, the following language is used in one of the opinions of the supreme court:

"I take it the statute, at least, prohibits an assignment of all the property of an insolvent debtor to a trustee for the benefit of all his creditors, even though they are to enjoy it *pro rata*; while it allows a preference to be given to favorite creditors, to the exclusion of others, and especially if the insolvent excepts from the assignment a remnant of his property. Thus equality among creditors is discountenanced, in disregard of the long established maxim that equality is equity." *Hull v. Denison*, 17 Vt. 310.

Our conclusion, based, as we think, upon both principle and authority, is that the statute under consideration should not be construed as prohibiting or interfering with the making of partial assignments; that, so far as the statute is concerned, such assignments are perfectly valid. The repeal of the act in question, and substitution therefor of a more comprehensive law, by the Fifth general assembly, being subsequent to the transactions involved, could not in any event affect the decision of this case. Since the deed to Campbell omits all personal property of the firm at Deadwood, it is a partial assignment. It follows from the foregoing conclusion that this assignment was valid at common law, and that the statute then existing had no application thereto. We do not deem the suggestion made in *Van Patten v. Burr*, 52 Iowa, 518, S. C. 3 N. W. Rep. 524, distinguishing between assignments directly to the creditor in *payment*, and assignments in trust for creditors, sufficiently supported by either reason or authority to warrant a modification of the foregoing views.

5. But counsel for defendant in error argue that the deed to Metcalf, the assignment to Campbell, and the Dakota mortgages were all executed in pursuance of a single design on the part of the partnership, and consequently those instruments represent but one transaction; that it was the intention of the partners to make a general assignment, with preferences, but that for the purpose of evading the statute, and securing the preferences which it prohibited, they devised and executed the plan of preferring the favored creditors in separate writings. Upon these grounds counsel base the conclusion that the assignment in question should be held void. It may be impossible, considering the facts before us, and the view that our statute did not prevent partial assignments, to say that a general assignment could have been here contemplated, or that an evasion of the statute was attempted; but, admitting for the purposes of argument, the correctness of the foregoing premises stated by counsel, we are satisfied that the conclusion they draw therefrom is unsound. There is no language in the statute which, under any circumstances, invalidates the assignment itself. The preferences only are declared to be void. In this respect it is unlike corresponding provisions which now exist or have existed in Massachusetts, Iowa, Alabama, and other states. If preferences were given in the deed of assignment, no one contends that the assignment itself would thereby fail; but if preferences stated in

the instrument would be harmless, why should the declaration thereof through separate writings render the assignment void?

The fact that an insolvent debtor clearly attempts to evade the statute by preferring certain creditors in separate transfers or instruments conveying portions of his property at or about the time he makes a general assignment, if such fact can be and is established, may be a reason for avoiding the preferences so given, in a suit by or on behalf of injured creditors; but it is not a reason for declaring the assignment itself invalid. The assignment, this being the only objection thereto, may well be permitted to stand, and the property included be distributed ratably by the assignee among the creditors. The purpose of the statute was not to discourage or restrain the making of general assignments, but to inhibit partiality therein toward favorite creditors. To say that the assignment itself must fall on account of the attempted evasion of the provision relating to preferences, is to give an effect to the law which the legislature did not express, and which we are satisfied it did not intend. Therefore it makes no difference, so far as the question here involved is concerned, whether or not the Metcalf assignment and the Dakota mortgages were a part of the same transaction with the assignment to Campbell. Assuming that they were, and that all, taken together, constitute a general assignment wherein the assignors attempted to evade the statute, still the Campbell branch of the transaction, the validity of which is the only question before us, should be sustained.

6. The much-abused principle that a deed which is partly void as against the provisions of a statute, or as against the common law, is void altogether, has no application to the case at bar. This transaction, if it could be considered a general assignment, would not be in conflict with either the statute or the common law. The statute would simply operate to annul the preferences, allowing the assignment to stand, while the common law would sustain both the preferences and the assignment. On the misapplication and also the true use of the maxim, "void in part, void in toto," see *Curtis v. Leavitt*, 15 N. Y. 123, 124, and cases cited; *Savage v. Burnham*, 17 N. Y. 576. It must be remembered always that the deed to Campbell, considered by itself, is not challenged on the ground that there was any fraud in fact connected with its execution; moreover, that it is admitted that the assignment to Metcalf paid or secured a *bona fide* indebtedness of the partnership, and that the Deadwood mortgages secured claims existing against the firm, in favor of the creditors named therein.

7. One question yet remains to be considered. The list of creditors mentioned in the schedule filed for record after this suit was brought, contains, among other names, that of a firm known as Jensen & Johnson. The Jensen there referred to is admitted to be one of the partners in the partnership making the assignment under consideration. Counsel contend that this fact invalidates the assignment in law, since one of the assignors is a beneficiary, and will re-

ceive a small part of the proceeds from the sale of the assigned estate. Their position is, we think, untenable. Section 1520, Gen. St., upon which this objection is based, reads as follows:

"All deeds of gift, all conveyances and transfers or assignments, verbal or written, of goods, chattels, or things in action made in trust for the use of the person making the same, shall be void as against the creditors existing of such person."

The intent with which the transaction is had governs the application of this provision. Similar statutes have been held to include only those cases where the use or the trust for the benefit of the grantor was the principal purpose accomplished by the conveyance, but where such benefit was merely an incident, the main purpose and effect of the instrument being lawful, the application of the statute, save possibly as to such incidental use or benefit, has been denied.

In *Curtis v. Leavitt*, *supra*, at pages 122 and 123, it is said:

"All reasoning and all authority, as we have seen, concur in the conclusion that it [the statute of personal uses] has no application to cases of real and actual alienation upon valuable consideration, and for active and real purposes, although incidental benefits are reserved to the grantor. \* \* \* This statute, then, only avoids conveyances, etc., which are *wholly* to the use of the grantor. If we came to a different conclusion, if we held that it applied to transfers made for other objects, but containing a residuary interest or partial use for the debtor, then the question would arise whether the whole is void or only so much of the grant as is not sustained by the valid purpose for which it was made. On this point I should come to the conclusion that the statute does not subvert all instruments in which any inoperative trust is expressed along with others that are good, but leaves those which are good and valid to stand."

And, among the propositions adopted by the court, on page 295 is the following:

"It being the opinion of the court that the statute applies only to conveyances, etc., primarily for the use of the grantor, and not to instruments for other and active purposes where the reservations to the grantor are incidental and partial." See, also, *Morgan v. Bogue*, 7 Neb. 429; *Shoemaker v. Hastings*, 61 How. Pr. 97

In determining the question before us, the character of the use intended by the deed is likewise an important consideration. It is extremely doubtful if Jensen individually would realize any material benefit by the payment of the claim of Jensen & Johnson; for his interest in the sum thus received would, of course, be liable for the debts of that partnership, while it is not beyond the reach of the creditors of Jensen, Bliss & Co. after they have exhausted the property of the latter firm. See *Fanshawe v. Lane*, 16 Abb. Pr. 71; *Welsh v. Britton*, 55 Tex. 118.

8. Under the foregoing views the operation of the assignment statute considered was confined to a narrow field. As now construed, it permitted the debtor to choose between a general and a partial assignment, and its only effect was to require that if he elected to make

the former, and this deprived his unpreferred creditors of recourse against his property, and divested himself of all control over his entire estate, so that he could not personally superintend the payment of his debts therefrom, such estate should be divided *pro rata* among his creditors. But we are satisfied, not only that this interpretation of the statute is in harmony with the language used, and supported by authority, but also that it may be in accord with the better reason and the sounder policy. Experience demonstrates the extreme danger of interfering by legislation with the debtor's *jus disponendi*, so long as he retains dominion over his property. Even a careful and skillful attempt by statute to fully guard all the equitable rights of creditors might result in untold disaster to the business world. Accordingly legislative bodies, our own included, have exercised extreme caution in dealing with the subject of assignments, and have left untouched many of the principles relating thereto which prevail at common law.

Our assumption, in the opinion filed, that the statute inhibited partial assignments for the benefit of creditors, was broader than its provisions justified, and led to a conclusion which, as already suggested, we now consider erroneous.

The judgment will be reversed, and the cause remanded.

## SUPREME COURT OF CALIFORNIA.

(89 Cal. 79)

HALL v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO. (No. 11,349.)

Filed March 10, 1886.

1. EXECUTORS AND ADMINISTRATORS—VERIFICATION OF CLAIMS AGAINST ESTATE.  
Where a claim against the estate of a decedent is verified by an affidavit stating that "the amount thereof, to-wit, the sum of four hundred, is justly due," the word "dollars" being omitted, such omission will not affect the validity of the claim, where the defect is supplied by reference to the body of the claim.
2. SAME—REFERENCE.  
A reference of a claim against the estate of a decedent is sufficient, under the California Code of Civil Procedure, section 1507, if made in court on the consent of parties.

In bank. Application for writ of review.  
*Geo. D. Collins*, for petitioner.

MYRICK, J. Application for a writ of review. Two points are made by petitioner:

1. That the claim was not properly verified. The estate of Mary Ann Hall, deceased, was in process of administration, and one Newman presented to the administrator a claim for \$400, for services rendered to deceased in her life-time. It was stated in the claim to be for the sum of \$400. In the affidavit to the claim it was stated "that the amount thereof, to-wit, the sum of four hundred, is justly due," etc., the word "dollars" being omitted. It is claimed that the affidavit was not sufficient in that it did not state that any sum was due the claimant. We think the affidavit sufficient; it referred to the body of the claim, in which the amount was stated, and then said the amount thereof \* \* \* was justly due.

2. That there was no reference, as provided in section 1507, Code Civil Proc. The parties signed a written stipulation, and thereupon the court in which the administration was pending made an order of reference. The point is made that as the approval by the court or judge was not made upon the stipulation, and filed as a distinct act, there was no valid reference. A clause in the section referred to reads: "If the parties consent, a reference may be had in the court." This portion of the section was complied with.

The application is denied, and the order is discharged.

McKINSTRY, ROSS, SHARPSTEIN, and THORNTON, JJ., concurred.

v.10p.no.4—17

## McKAY v. JOY. (No. 9719.)

Filed March 12, 1886.

## DISSENTING OPINION OF THORNTON, J.

In bank. Appeal from superior court, county of Amador. The principal opinion of the court in this case is reported in 9 Pac. Rep. 940.

*A. C. Brown*, for appellant.

*Eagon & Armstrong*, for respondent.

THORNTON, J. I dissent from the opinion filed in this case, February 19, 1886.

(69 Cal. 83)

## LANDIS v. MORRISSEY. (No. 9,278.)

Filed March 15, 1886.

## 1. PLEADING—NEW MATTER.

New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. It is a matter arising subsequently to the origin of the cause of action.

## 2. SAME—GENERAL ISSUE—NEW MATTER.

Where the complaint in an action averred that the firm, of which the defendant is the surviving partner, promised to pay for goods sold and delivered to it whenever requested, but had failed to do so, and defendant denied this and every count; and, on the issue offered at the trial to prove that the goods alleged to have been sold to such firm were really purchased by it on a credit of 60 days, the period of which had not expired when the action was commenced, *held*, that such evidence should have been admitted under the plea of the general issue, and that it did not constitute new matter which should have been specially pleaded.

Department 2. Appeal from superior court, city and county of San Francisco.

*Henry E. Highton*, for appellant.

*McAllister & Bergin*, for respondent.

THORNTON, J. The question in this case arises on an offer to introduce certain testimony. The point presented is to be determined upon the allegations of the complaint and the denials of the answer. There are several counts in the complaint, all of which were answered, but as the counts and the answers to them are the same as to the point to be decided, we shall present here only one of each. The plaintiffs aver:

"*First*, that during all the several periods of time hereinafter stated said plaintiffs were and still are partners doing business in said city and county of San Francisco, under the firm name of Landis & Jacoby, and during said several periods of time, up to the twentieth of April, 1882, the defendant and one S. Boeh were partners doing business in said city under the firm name of Boeh & Morrissey; that on or about the twentieth of April, 1882, at San Francisco, said S. Boeh died, leaving defendant the sole surviving partner of said firm; *second*, that, to-wit, at said city and county of San Francisco, state

of California, within a period of six months prior to the commencement of this action, and prior to the death of said S. Boeh, plaintiffs sold and delivered to said partnership of which defendant is sole survivor, as hereinbefore alleged, at their special instance and request, goods, wares, and merchandise at agreed prices, amounting to the sum of two hundred and eighty-eight dollars and seventy-one cents, (\$288.71;) that said goods, wares, and merchandise were reasonably worth said sum, which said sum they promised to pay whenever thereunto requested, but, though often thereunto requested, they have not, nor has either of them, paid any part of the same, and the whole amount thereof remains due and unpaid."

The answer of defendant to this count is as follows :

"Denies that plaintiffs sold or delivered to said partnership, of which this defendant is survivor, in manner and form in said second count alleged, the goods, wares, or merchandise therein mentioned, or any part thereof, or for the agreed prices in said second count alleged, or for any agreed price or prices; and denies that said partnership, at the time or place in said second count alleged, or any time or place, agreed to pay the sum in said second count specified, or any sum to said plaintiffs whenever thereunto requested."

On the trial, as stated in the bill of exceptions, to prove their case, and each and every count in their complaint contained, the plaintiffs introduced witnesses, and upon the cross-examination of these witnesses, and also as part of his own case, the defendant offered to prove that the goods, wares, and merchandise alleged in each count of the complaint to have been sold to defendant and his deceased partner were purchased by the firm of Boeh & Morrissey from the plaintiffs upon a credit of 60 days, the period of which had not expired when this action was commenced. The plaintiffs objected to the testimony offered on the ground that it was not within the issues raised by the pleadings. The court sustained the objection, and defendant reserved an exception. The complaint averred that the firm of which the defendant is surviving partner promised to pay for the goods sold and delivered to it whenever thereunto requested, but though often requested nothing has been paid. The defendant denied this, as he did every material allegation of the count.

It is contended here that the offer of defendant was new matter, and should have been specially pleaded; and not having been so pleaded, the testimony proposed in the offer was properly excluded. The contention is maintainable if the offer presented new matter. What is new matter? New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. Of this character are release and accord and satisfaction. *Coles v. Soulsby*, 21 Cal. 50; *Gould*, Pl. c. 3, § 195; *Frisch v. Caler*, 21 Cal. 71; *Hawkins v. Borland*, 14 Cal. 413; *Clafin v. Baere*, 28 Hun, 204; *Wilder v. Colby*, 134 Mass. 377. It is a matter arising subsequently to the origin of the cause of action. A plea of release admits the cause of action, but sets forth a release subsequently executed by the party authorized to release the cause of action. So, also, a plea of accord and satisfaction. Such new matter the defendant must affirm-

atively establish. *Coles v. Soulsby*, *supra*. See "Plea of Release," 3 Chit. Pl. 930; "Pleas of Accord and Satisfaction," *Id.* 924, 1002, 1031, 1062.

But the matters here offered to be shown were not of those occurring after the cause of action arose. The defendant's offer was to show that the cause of action did not exist when the action was begun. The answer put in issue all the material allegations of the complaint. The offer was to prove that the cause of action had not accrued when the suit was brought. At common law this was permissible under the general issue, (Gould, Pl. § 44, c. 6,) and new matter was not, according to the strict original principles of the common law, admissible under the general issue any more than under the system established by the Code, (Gould, Pl. § 44, *supra*.) In *Wilder v. Colby*, *supra*, the action was for goods sold and delivered, and the declaration alleged that the defendant was indebted to plaintiff in a certain sum of money for the goods so sold. The answer was a general denial. The evidence showed that the property had been sold on a credit, which had not expired when the action was brought. It was ruled that the action could not be maintained.

We are of opinion that the court erred in excluding the testimony embraced in defendant's offer, and for that reason the judgment and order must be reversed, and the cause remanded.

Counsel are in error in assuming the offer of defendant could only be presented in a plea in abatement. It goes to the merits of the action, and shows that it never existed when the suit was brought. Gould, Pl. c. 2, §§ 32, 33. It is an answer to the whole action, and perfect defense. Such a defense can be made without any plea in abatement. It does not merely abate the action; it defeats it. *Wilder v. Colby*, *supra*; *Hanna v. Mills*, 21 Wend. 92; *Manton v. Gammon*, 7 Bradw. (Ill.) 201. Nor is the case here presented one of an immaterial variance. The testimony offered and rejected would have shown a failure of the plaintiffs to prove their cause of action. Code Civil Proc. § 471. We have examined the cases cited by the counsel for plaintiffs, (*Levinson v. Schwartz*, 22 Cal. 229; *Wilkins v. Stidger*, *Id.* 232, 233; *Nelson v. Murray*, 23 Cal. 338; *Lightner v. Menzel*, 35 Cal. 452,) and find nothing in them inconsistent with what is said herein.

From what has been said above, it becomes unnecessary to pass on the application made by defendant to the court below to be permitted to amend his answer.

Judgment and order reversed, and cause remanded for a new trial in accordance with the views set forth herein.

We concur: McKee, J.; Sharpstein, J.

## LANDIS v. MORRISSEY. (No. 9,279.)

Filed March 15, 1886.

## JUDGMENT REVERSED.

On authority of *Landis v. Morrissey*, (No. 9,278,) *ante*, 258, judgment reversed.

Department 2. Appeal from superior court, city and county of San Francisco.

*Henry L. Highton*, for appellant.

*McAllister & Bergin*, for respondent.

BY THE COURT. The same question is presented in this cause as in *Landis v. Morrissey*, (No. 9,278,) *ante*, 258, and in accordance with the ruling therein the judgment and order are reversed, and the cause remanded for a new trial, as in the case above mentioned, No. 9,278.

(69 Cal. 38)

*Ex parte GUERRERO.* (No. 20,153.)

Filed March 16, 1886.

## 1. MUNICIPAL CORPORATIONS—CHARTERS—EFFECT OF CALIFORNIA CONSTITUTION OF 1879.

The effect of the California constitution of 1879 on municipalities of the state is not to abrogate their charters, nor change the powers granted by them, except where they may have been enlarged or contracted by its provisions; but, on the contrary, existing municipalities are made more independent of state control by inhibiting the state legislature from passing special laws for any municipality, and from imposing taxes for any special purpose, and conferring upon them at the same time power to make and administer, within their respective limits, all such local, police, sanitary, and other laws as are not in conflict with general laws.

## 2. SAME—CHARTER OF LOS ANGELES—POWER TO LICENSE.

Under the charter of 1878 and the California constitution of 1879 the city of Los Angeles had power to pass its ordinance of September 29, 1885, providing for the licensing of business carried on in such city, as, at the time of the passage of such ordinance, no general law has been passed by the legislature which, in its terms or by implication, conflicted with the provisions of such ordinance, or restricted the municipality of Los Angeles in the exercise of its power in that regard.

## 3. SAME—AUTHENTICATION OF ORDINANCE.

Under a municipal charter providing that "every ordinance and resolution which shall have been passed by the council shall, before it becomes effective, be signed by the clerk of the council," etc., and also authorizing the election of a city auditor, who, it was provided, should be "*ex officio* clerk of the council,"—it is not necessary for such officer, in authenticating an ordinance, to designate himself as "auditor and *ex officio* clerk of the council," but it is sufficient, under the California statute, (Cal. Code, § 1031,) if he designate himself as the "clerk of the council" of said municipality.

## 4. SAME—CITY ORDINANCE, PUBLICATION OF.

In order to render a city ordinance effectual, its publication is not necessary, and the fact that an ordinance contained an order for its publication, as prescribed by the city charter, does not affect the validity of the order or ordinance.

## 5. SAME—DISCRETION AS TO LICENSING.

Where a municipality is granted the power to license, the power to consider and determine the nature of the occupations, trades, and business to be licensed is implied; and, in the exercise of such power, the legislative body can discriminate between business which may be useful and beneficial to the

community, and that which may be immoral or disorderly in its nature or tendency, and may fix licenses at such sums as to it shall seem just and equitable, and the courts have no power to control the exercise of such discretion over subjects within the jurisdiction of the corporation.

6. SAME—OPPRESSIVE LICENSE, WHAT CONSTITUTES.

A city ordinance cannot be judicially held unreasonable, oppressive, or in restraint of trade which fixes the amount of the license for carrying on the business of selling liquors, in quantities less than one gallon, at \$50 per month.

7. SAME—CHARTER OF LOS ANGELES—POWER TO PUNISH—VIOLATION OF ORDINANCE.

The city of Los Angeles, under its power to make and enforce all such local, sanitary, and other laws as are not in conflict with general laws, is authorized to punish as a misdemeanor any violation of an ordinance fixing a license for the privilege of carrying on the business of liquor selling, etc.

8. SAME—DELEGATION OF MINISTERIAL POWER TO CLERK.

A city council has power to delegate to the clerk the authority to perform ministerial acts of issuing and collecting the licenses imposed by such ordinance, and also to make the granting of a license conditional upon obtaining a permit from the board of police commissioners of the city.

9. SAME—LOS ANGELES CITY COURT—EFFECT OF CALIFORNIA CONSTITUTION OF 1879.

The Los Angeles city court, created by its charter of 1878, was not abolished by the California constitution of 1879; and the fact that the same person officiated as mayor, and as mayor presided over the council which passed the ordinance in question, did not divest him of his authority under the charter to act as the judicial officer of such court, on the trial of a misdemeanor for violation of the ordinance; nor is he rendered incapable of presiding over such trial by reason of the fact that the charter requires all fines collected in such court to be paid into the salary fund, or because his action in approving the ordinance has been severely criticised by the city press.

Ross, J., dissenting.

In bank. Application for writ of *habeas corpus*.

*Bicknell & White* and *Howard & Roberts*, for petitioner.

*J. W. McKinley, W. T. Williams, and F. P. Kelly, contra.*

McKEE, J. The petitioner complains that he is imprisoned under a judgment given against him by the city of Los Angeles for having violated an ordinance of the city by "carrying on, within the corporate limits of the city, in his own name, and for his own profit and benefit, the business of a place where spirituous and vinous, malt, and mixed liquors were sold in quantities less than one gallon, without first procuring a license so to do;" and he asks to be discharged from imprisonment on the ground that the ordinance is void, and the judgment of conviction invalid. The ordinance is entitled "An ordinance to provide for the licensing of business carried on in the city of Los Angeles," approved September 29, 1885; and the contention is that it is void because the municipal legislative body of the city had no power to pass it, and because it was not authenticated and ordered published as required by the city charter.

The charter was granted in the year 1878. Under it the city was administering its local affairs, as an existing municipality of the state, at the time of the adoption of the present constitution, sections 11 and 12 of article 11 of which provide:

"Sec. 11. Any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws.

"Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

And section 5 of article 1 of the charter of the city granted power to "the mayor and council of the city \* \* \* to license the carrying on and conducting of any and all professions, trades, callings, and occupations, or other business, by any person, natural or artificial, within the corporate limits of said city, to fix the amount of license tax thereon, and to be paid by such persons therefor, at such sums, respectively, as the said council shall think equitable and just, and may, in the name and for the benefit of said corporation, enforce, in such manner as it sees proper to prescribe, the payment of such license taxes, by suit, either with or without attachment, in the proper court, under the laws of this state, or by fine and imprisonment, or either, or in such other manner as in said ordinance may be provided." St. 1877-78, p. 655.

The power of the city to pass the ordinance under consideration is therefore derived from the charter of the city and the constitution of the state. Of the power of the state to authorize the license of all classes of trades and employments there is no doubt; and there is just as little doubt that the legislature, at the time it granted to the city of Los Angeles its charter of incorporation, had authority to delegate to the city the power of the state for that purpose. But a legislative grant of power to a municipal corporation, to license business, etc., within its corporate limits, does not necessarily include a power to impose licenses for revenue purposes. The distinction between the two powers is well recognized. Imposing licenses for regulating business, etc., is an exercise of the police power, while imposing them for revenue purposes is an exercise of the taxing power. 2 Dill. Mun. Corp. § 768. It may, therefore, be questionable whether, before the constitution of 1879, the city had, under its charter, power to impose licenses for purposes of revenue; but, under the provisions of the constitution which we have quoted, there is no doubt of the power of municipalities to impose licenses for the purpose of regulation, or revenue, or for both regulation and revenue, and for those purposes the power of the municipality of Los Angeles has been sustained in *City of Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 60.

The present constitution did not abolish the municipalities of the state, nor abrogate their charters, nor change the powers granted by them, except where they may have been enlarged or contracted by its provisions. On the contrary the constitution made existing municipalities more independent of state control by inhibiting the state legislature from passing special laws for any municipality, and from

imposing taxes "for any municipal purposes." At the same time it conferred upon all existing municipalities power to make and administer, within their respective limits, all such local, police, sanitary, and other laws as are not in conflict with Gen. Laws. Art. 11, § 11. There was no general law passed by the legislature which, in its terms or by implication, at the time of the passage of the ordinance in question, conflicted with the provisions of the ordinance, or restricted the municipality of Los Angeles in the exercise of its power to pass the ordinance. *Ex parte Ah Toy*, 57 Cal. 92. The ordinance was therefore in harmony with the constitution of the state, the general laws of the state, and the city charter.

But it is contended that the ordinance did not become a law of the municipality, because, as passed by the "mayor and council," it was not authenticated in the form prescribed by the charter, and was not ordered to be published as the charter required. There is appended to the ordinance a certificate in the following words:

"I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of September 22, 1885.

"W. W. ROBINSON,

"Clerk of the Council of the City of Los Angeles."

This certificate appears to have been made under section 2 of article 12 of the charter, which provides: "Every ordinance and resolution which shall have been passed by the council shall, before it becomes effective, be signed by the clerk of the council, and be presented to the mayor for his approval and signature." It is said there was no such officer as "clerk of the council" elected or appointed by the city. But the charter authorized the election of a city auditor, who, it was provided, "shall also be *ex officio* clerk of the council." There were, therefore, two offices, whose functions were to be performed by one and the same person. In the performance of his official functions, where it became necessary for him to authenticate an official act, done in either office, the law of his position did not require the officer to designate himself as "auditor and *ex officio* clerk of the council." On the contrary, the Code law provides: "When an officer discharges *ex officio* the duties of another office than that to which he is elected or appointed, his official signature and attestation must be in the name of the office the duties of which he discharges." Section 1031, Pol. Code. The signature to the certification of the ordinance was therefore according to law, (*Touchard v. Crow*, 20 Cal. 150;) and there was an order made according to law for the publication of the ordinance. The ordinance itself contained an order for its publication, worded as follows:

"Sec. 5. The clerk of the council shall certify to the passage of this ordinance, and shall cause the same to be published once in the *Los Angeles Daily Herald*, and it shall take effect and be in force from and after November 1, 1885."

We think that was sufficient. The fact that the order was made and included in the ordinance does not affect the validity of the order or ordinance. To render the order effectual its publication was not necessary, and no contention is made that the ordinance was not published under the order. It follows that the ordinance was certified and ordered published as prescribed by the charter.

Another objection is that, conceding that the ordinance was passed according to prescribed forms, it is unreasonable, and in restraint of the business for the regulation of which it purports to have been passed. The amount of the license is \$50 per month, or \$600 per annum. That amount was fixed by a section of the ordinance in the following words:

"Sec. 2. That the monthly rates of license for the pursuits, business, trades, occupations, avocations, and employments hereinafter named be, and the same are hereby, established for and within the city of Los Angeles, and the same shall be paid by the owners or proprietors thereof as follows, that is to say: \* \* \* For every saloon, bar, store, or place, including club-rooms where spirituous, vinous, malt, or mixed liquors are sold or given away in quantities less than one gallon, \$50 per month: Provided, further, that no license to keep a saloon, bar, or other place for the sale of spirituous, vinous, malt, or mixed liquors shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council; and the board of police commissioners shall have power to issue such permit and revoke the same at any time," etc.

It is insisted courts are bound to take judicial notice that such an imposition is *per se* a virtual embargo against the sale of liquors less than a gallon, and, for that reason, *ultra vires*. But the power to impose licenses at all for municipal purposes being granted, it was coupled with the power to consider and determine the nature of the occupations, trades, and business to be licensed; in the exercise of which the legislative body could discriminate between business which may be useful and beneficial to the community, and that which may be immoral or disorderly in its nature and tendency, and fix the licenses at such sums as to it "shall seem equitable and just." The power to fix the amount of licenses for all classes of business was therefore left to the discretion of the municipal legislature; the exercise of such discretion over subjects within the jurisdiction of the corporation cannot be controlled by the courts. Courts are bound to presume the legislature deals with such matters for the public good; and the municipal law, which expresses the will of the municipality upon those matters, will be presumed to be reasonable, unless the contrary appears on the face of the law itself. "It is not to be expected," say the supreme court of Missouri, "that every power will always be exercised with the highest discretion; and when it is plainly granted, a clear case should be made to authorize an interference upon the ground of unreasonableness." *City of St. Louis v. Weber*, 44 Mo. 550.

Applying these principles to the ordinance under consideration we cannot judicially say, as matter of law or fact, that the amount of the license complained of in this proceeding is oppressive, unreasonable, or prohibitory of trade. *Ex parte Benninger*, 64 Cal. 291. In *Ex parte Hurl*, 49 Cal. 558, it was said: "It certainly cannot be assumed that the exaction of \$50 for the privilege of retailing spirituous liquors, \* \* \* for the period of 90 days, will, *per se*, put an end to that business;" and in *Ex parte Wolters*, 65 Cal. 269, S. C. 3 Pac. Rep. 894, the license exacted for carrying on a like business in Butte county was \$50 per month, as in this case, and it was sustained by this court. See *People v. Dwyer*, 4 Pac. Rep. 451.

Another attack upon the ordinance is that it declares that any violations of its provisions "shall be deemed a misdemeanor, and punishable as such." This, it is urged, was in excess of the power of the municipal legislative body, because the state legislature itself could not delegate to a municipal corporation power to determine what shall constitute a criminal offense. But the charter contains the following provisions:

"The mayor and council, or either, when authorized by this act to adopt any ordinance or resolution, or make any rules or regulations, such municipal authority so empowered shall have the further power, and is hereby authorized, to provide that each and every violation of such ordinance, resolution, rules, or regulation shall be and constitute a misdemeanor," etc.

In *State v. Tryon*, 39 Conn. 183, a like contention was urged against an ordinance passed under a charter which provided "that the violation of any ordinance relative to nuisances injurious to health, illegal voting, obstructions to streets, illegal charges of hackmen, weights and measures, or any order or ordinance designed to prevent vice, immorality, or disorder, etc., shall be a misdemeanor, and may be prosecuted as such before the police court of the city like other offenses;" but the supreme court of Connecticut held that the contention was not maintainable. Says the court:

"All the authority that the city council have in the premises is simply to determine whether they will pass ordinances on those subjects or not. If they pass such ordinances, it is the charter, passed by the legislature in the form of a law, and which has all the authority of a statute law, that declares that a violation of such ordinances shall be a misdemeanor. \* \* \* The legislature have declared that the maximum penalty is none too great for a violation of the ordinance, if one should be made."

Besides, as we have seen, the constitution of the state empowered the municipality to make and enforce, within its limits, all such local, sanitary, and other laws as are not in conflict with general laws. The power thus delegated by the constitution itself, for local purposes, included a power to prescribe punishment for disobedience of laws by fine, penalty, or imprisonment. Denominating the act of disobedience a misdemeanor, and making it punishable as such, is within the power granted, and does not affect the validity of the ordinance.

Again, section 4 of the ordinance provides:

"It shall be the duty of the clerk of the council to issue a license under this ordinance to each person so reported to him, and for all other persons known to the clerk, liable to pay a license under this ordinance, duly signed by the mayor of said city and clerk of the council, and to fix and state the amount of license thereon, and on the first Monday of each month deliver such license to the said city tax collector for collection, taking his receipt for the amount thereof, and the said clerk, in fixing the rate of license for the several classes in this ordinance hereinbefore specified, shall grade the same according to his best information and knowledge, and for that purpose may confer with the persons in interest, and may require any person to file his or her affidavit as to which class he or she may belong: provided, that in no case shall any mistake by the clerk in fixing the amount of said license prevent the collection of what shall be actually due, with all costs, against any one selling or carrying on said business without license, or refusing to pay such rate so fixed by the clerk. It shall be the further duty of said clerk, immediately after the delinquent list has been delivered to him, to deliver the licenses uncollected to the chief of police, whose duty it shall be to at once proceed to collect the same, in his discretion, by suit or otherwise."

It is said that the duties which this section of the ordinance directs the clerk to perform were incumbent upon the council, to whom power to perform was delegated; and, being delegated to the council, that body could not delegate its powers to its clerk, or any other officer. The provisions, however, were only regulative of the mode of issuing and collecting the licenses imposed by the ordinance; the acts required of the clerk and tax collector were therefore ministerial; and while it is undoubtedly true that public powers and trusts devolved by law or charter upon the governing body of a municipality, to be exercised by it in such a manner as it shall judge best, cannot be delegated to another, (*Birdsall v. Clark*, 73 N. Y. 73,) yet the power to do acts, which do not involve judgment or discretion, but are merely mechanical or ministerial, may be delegated. "The true distinction," observes the supreme court of Ohio, "is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, W. & Z. R. Co. v. Commissioners Clinton Co.*, 1 Ohio St. 88.

The following proviso in the ordinance is also challenged:

"No license to keep a saloon or bar, or other place, for the sale of spirituous, vinous, malt, or mixed liquors, shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council; and the board of police commissioners shall have power to issue such permit, and revoke the same at any time; and after the filing of such revocation with the clerk of the council the said clerk shall issue no further license to the party whose permit is revoked until a new permit be granted said party."

This condition imposed upon persons entitled to licenses affects only the operation of the ordinance, and not its existence. It is the mode prescribed for issuing licenses to persons who want to engage

or wish to continue, in a licensed occupation. As mere mode the condition imposed is not more unusual or onerous than statutory law or local ordinance, passed in the exercise of the police power of the state, has frequently prescribed for other occupations or professions. Says the supreme court, in *Ex parte Yale*, 24 Cal. 242: "The manner, terms, and conditions of an attorney's admission to practice, and of his continuing in practice, as well as his powers, duties, and privileges, are subject to legislative control the same as any other profession or business that is created or regulated by statute;" therefore the statute which required, as a condition to admission to practice, or to continue in practice, the taking of the oath prescribed, was constitutional. So in *Ex parte Frazer*, 54 Cal. 94, and *Ex parte Johnson*, 62 Cal. 263, we held that a statute, passed to regulate the practice of medicine, which made it a misdemeanor for a physician to practice medicine without having first procured a certificate from a board of examiners, appointed by certain medical societies, was not subject to constitutional objection.

Lastly, it is contended that the judgment of conviction is void because (1) the city court of Los Angeles was abolished by section 1 of article 6, and section 1 of article 22 of the present constitution; and, (2) if not abolished, the court had no jurisdiction to try the petitioner for the offense with which he was charged.

The constitution of 1879 abolished all courts except "justices' and police courts,"—these it continued in existence. Section 3, art. 22, Const. At the same time it vested the judicial power of the state in certain designated courts, and authorized the legislature to establish inferior courts in any incorporated city or town, or city and county, and fix by law their jurisdiction, and the powers, duties, and responsibilities of the judges thereof. Sections 1, 13, art. 6, Const. But the judicial departments of the municipalities of the state, as created by their respective charters, were not affected by these provisions. The constitution left all municipal bodies free to administer their local affairs under their forms of municipal government, with the powers conferred upon them by their charters, and such additional powers as were thought adequate to the purposes of their creation. This was the *status* of the municipal corporations of the state at the time of the adoption of the present constitution. As such they have since continued to exist before and after the first day of July, 1880, the day fixed by section 1, art. 22, of the constitution, for the cessation of all laws inconsistent with its provisions, working under charters unchanged, except in such changes as may have been made by the constitution; and the existence of each municipality under its charter is continued by the constitution until a majority of the electors of the municipal body determine to reincorporate under the general law, or to frame a charter for its government. *Desmond v. Dunn*, 55 Cal. 242; *Wood v. Board of Election Com'rs*, 58 Cal. 561.

We are not aware that the city of Los Angeles has reorganized or

reincorporated under any general law, or that its charter has been changed since the constitution went into effect pursuant to its provisions. The judicial power of the city is therefore vested in the court to be held by the judicial officer provided by the charter; and as such he could exercise such judicial powers as may be contained in the charter, and try and determine all local causes within the charter jurisdiction conferred upon him. *People v. Henry*, 62 Cal. 557; *Ex parte Carillo*, 4 Pac. Rep. 695. The fact that the same person officiated as mayor, and as mayor presided in the local legislative body which passed the ordinance, did not divest him of his authority under the charter to act as the judicial officer of the court. The provisions of the charter which made the mayor of the city a component part of the council, and "*ex officio* city judge," are not in conflict with the constitution. As was said in *Uridias v. Morrill*, 22 Cal. 474, "there is nothing in the constitution which prohibits the legislature from declaring the mayor of a city to be *ex officio* a justice of the peace; and, under such a law, the same person may constitutionally exercise the functions both of mayor and justice." See, also, *People v. Provines*, 34 Cal. 520. A mayor's court, or a city court as a mere municipal court, is regarded as a justice's court.

The city court had jurisdiction of the action and the person of the defendant. Having jurisdiction of the action and the party defendant, the judge of the court had power to proceed to the final disposition of the same, unless from interest, or some other reason, he was disqualified from acting. His qualification to act was challenged by an affidavit, made and filed by defendant, which contained a statement of defendant's belief that he could not have a fair and impartial trial in the city court on account of the prejudice and bias of the judge who, as judge of the court and mayor of the city, was the subject of much acrimonious discussion by the newspapers and persons within the municipality in connection with the passage of the ordinance; and, in consequence thereof, "the said mayor and judge is interested in the result of the trial, and is interested in convicting affiant."

It is also urged that as section 12 of article 5 of the charter provides that "all fines collected in said city court shall be paid by the said judge into the city treasury, and be placed to the credit of the salary fund," and as subdivision 1 of section 2 of article 11 of the charter provides that the mayor of the city shall receive a monthly salary of \$150, the mayor, as *ex officio* city judge, was interested in convicting the petitioner of violating the ordinance. It is difficult to see how these provisions of the charter made the judge of the court personally or pecuniarily interested in a criminal action for violating an ordinance, so as to incapacitate him from trying it, and from enforcing conviction by the collection of a municipal fine or imprisonment. Nor does the fact stated, in the affidavit, "that the action of the mayor in approving the ordinance has been largely assailed in the city by individuals and by the press," disqualify the mayor, as *ex officio* city judge,

from exercising his judicial functions in proceedings before him, within his jurisdiction; nor was it sufficient as a basis for an application to change the place of trial in the proceedings; and there was no excess of jurisdiction in denying the application made upon the affidavit for that purpose. *People v. Williams*, 24 Cal. 31; *McCauley v. Weller*, 12 Cal. 500.

Writ dismissed and petition remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.; MORRISON, C. J.

Ross, J., (*dissenting*.) I think the portion of the ordinance involved in this case is void for the reason that the power conferred on the mayor and council by the charter of the city is in effect delegated by that body to the board of police commissioners. By the charter of the city of Los Angeles the power "to license the carrying on and conducting of any and all professions, trades, callings, occupations, or other business, by any person, natural or artificial, within the corporate limits of said city," is vested in the *mayor and council*. "The principle is a plain one," says Dillon in his work on Municipal Corporations, "that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others*. Thus, where by charter or statute local improvements, to be assessed upon the adjacent property owners, are to be constructed in 'such manner as the common council shall prescribe' by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must be exercised in strict conformity with the charter or incorporating act. So, where a power—for example, *the power to issue licenses*—is granted by law, or by an ordinance duly passed, to the mayor and aldermen, they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination; and when this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone." Section 96, 1 Dill. Mun. Corp. And in section 357 of the same volume the learned author says: "Where, by the charter of a city, the power to license a particular occupation within its limits is given to the common council, such power involves the necessity of determining, with reasonable certainty, both the extent and duration of the license and the sum to be paid therefor; and *must be exercised by the common council, and cannot be delegated by it, in whole or in part, to any person or authority*." See, also, *Cooley*, Const. Lim. 204.

Now, the ordinance here in question provides, among other things,

"that no license to keep a saloon, bar, or other place for the sale of spirituous, vinous, malt, or mixed liquors shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council, and the board of police commissioners shall have power to issue such permit and revoke the same at any time; and, after the filing of such revocation with the clerk of the council, the said clerk shall issue no further license to the party whose permit is revoked until a new permit be granted said party." This language does not admit of construction. It is direct and simple, and clearly and unequivocally makes the granting of the licenses in question to depend upon the action of the board of police commissioners. Nor is there any limit to the power thus attempted to be conferred upon that board. No conditions whatever are imposed, but the broad and unconditional power attempted to be given to grant or withhold permits at will. As by the terms of the ordinance no license can be issued for conducting the business in question until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council, it follows, necessarily, that the granting or withholding of such licenses is in effect vested by the ordinance in that board. No argument can make this plainer. It is, it seems to me, a self-evident proposition.

In the case of *City of East St. Louis v. Wehring*, 50 Ill. 28, the charter conferred upon the city council power "to restrain, prohibit, and suppress tippling-houses, dram-shops, gaming, bawdy, and other disorderly houses." The ordinance declared that "licenses may be granted under this article to proper persons for a period of not less than one month, nor more than six months, to be determined by the city treasurer in each case; but the city treasurer may, in his discretion, reject any application for license under this article for a longer period than one month, and, with the concurrence of the mayor, he may reject any application for license under this article." The court said:

"The provision of the charter manifestly intended that the power should be exercised by the city council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or to fix the amount which should be paid for a license. If the treasurer may, under this ordinance, refuse licenses with the concurrence of the mayor, then they, and not the city council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion, fix the sum to be paid, then he, and not the city council, would discharge that duty. In the proper exercise of this power the city council should adopt general ordinances, prescribing a general rule by which licenses might be obtained. They might, no doubt, prescribe the character of persons who might or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses. The ordinances should prescribe the amount required to be paid for such license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinance should be of that general character that all per-

sons coming within its requirements should be entitled, by complying with its provisions, to receive a license, and the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the city."

These observations by the supreme court of Illinois are applicable to the case before us. Of course, if the business in question, or any other licensed business, be conducted in a manner that is offensive or dangerous to the public interests, the governing body of the city may direct the manner to be changed, and prescribe regulations for its prosecution. But the right to regulate its prosecution is an altogether different thing from the right to delegate the power to license.

As, in my opinion, the portion of the ordinance involved in this case is void for the reason above given, it is unnecessary for me to consider any other point.

It results from these views that the petitioner is illegally restrained, and should be discharged.

(69 Cal. 105)

**LEVY v. WILSON, Judge, etc. (No. 11,366.)**

Filed March 17, 1886.

**1. WRIT OF PROHIBITION—JURISDICTION.**

Prohibition lies in California only to arrest proceedings of a judicial tribunal when they are without or in excess of its jurisdiction, and there is no plain, speedy, and adequate remedy in the ordinary course of law.

**2. CRIMINAL LAW—INDICTMENT—SUPERIOR COURT—JURISDICTION.**

When a criminal prosecution is founded upon an accusatory paper, purporting to be an indictment, but which is void by reason of not being found by a valid grand jury, the superior court can acquire no jurisdiction thereunder.

**3. GRAND JURY—ORDER FOR DRAWING, AMENDMENT OF.**

A drawing of a grand jury for the city and county of San Francisco, ordered as required by sections 219 and 241 of the Code of Civil Procedure, at a designated hour, on a certain day, was not invalidated by the fact that on such day the judge before whom the drawing took place amended the order by changing the hour designated therein; and such amendment did not divest the court of jurisdiction over the proceeding, nor did the absence of the presiding judge of the department of the court invalidate the drawing.

**4. SAME—DEFICIENCY IN PANEL, HOW FILLED.**

Where, from the persons summoned, a sufficient number to constitute a grand jury cannot be obtained, the superior court has jurisdiction, under the California statute, to fill out the deficiency of the original panel, either by an order for a sufficient number of jurors to be forthwith drawn and summoned to attend the court, or by an order entered in its minutes directing the sheriff forthwith to summon so many good and lawful men of the county, or city and county, to serve as grand jurors as may be required.

In bank. Application for writ of prohibition.

*Davis Louderback*, for petitioner.

*J. N. E. Wilson* and *T. Z. Blakeman*, for respondent.

**McKEE, J.** On the twentieth of September, 1885, there was returned and filed in department 11 of the superior court of the city and county of San Francisco an indictment for felony against the petitioner in this case, found by the grand jury. After the indictment

was filed the presiding judge of the superior court assigned it to department 1 of the said court for trial. The petitioner was afterwards arrested on a bench warrant issued upon the indictment, and was brought into court for arraignment. On his arraignment he challenged the panel and the individual jurors of the grand jury, moved to set aside the indictment returned by it, filed a plea in abatement, and moved to strike the indictment from the files of the court. The challenge, motions, and plea were based upon the grounds of want of jurisdiction, and irregularities and errors in law in the proceedings taken for ordering and impaneling the grand jury. The court disallowed the challenge, denied the motions, decided against the plea in abatement, and required the defendant to plead. He pleaded not guilty, and as the court is about to proceed to try the issues raised by the indictment and plea, the petitioner has applied for a writ of prohibition to restrain the court from proceeding to try him upon the indictment.

The petition contains the same grounds, as a basis for a writ of prohibition, upon which, in the court below, the petitioner challenged the panel and individual jurors of the grand jury. Most of the grounds stated for the purpose are irregularities and errors in law occurring before and after the finding and return of the indictment. But as these are matters which are reviewable and remediable on appeal in the action, they are not grounds for a writ of prohibition. Prohibition lies to arrest the proceedings of a judicial tribunal when they are without or in excess of its jurisdiction, and the writ is issuable only in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Proc. §§ 1102, 1103.

One of the grounds stated in the petition is that the indictment was found by a body of men styled a "grand jury," that was not in law and fact "a valid and constitutional grand jury." If that be so, the accusatory paper returned by them to the court below as an indictment is worthless and void, (*People v. Thurston*, 5 Cal. 69,) and the court has no jurisdiction to try the petitioner upon it; for no person can be held to answer for crime unless on information, after examination and commitment by a magistrate or an indictment of a grand jury, and in order that offenses committed in a county may be prosecuted by indictments, the constitution requires that a grand jury shall be drawn at least once a year. Const. § 8, art. 1.

As defined by the Code law of the state, a grand jury is a body of men, 19 in number, returned in pursuance of law from the citizens of a county, or city and county, before a court of competent jurisdiction, impaneled and sworn, according to law, to inquire into public offenses committed or triable within the county, or city and county. Code Civil Proc. § 192. For constituting such a body the legislature has provided that each of the superior courts of the counties of the state, whenever in its judgment the public interest requires it, shall make and file with the county clerk an order directing him to have

drawn, at the time designated in the order, in the manner prescribed by law, the designated number of names of persons to be summoned as a grand jury, and to certify a list of the names drawn to the sheriff of the county, who shall summon them, according to law, to be and appear before the court at the time designated in the order. Id. §§ 219, 241.

According to the petition, these things were done. On July 8, 1885, an order for a grand jury was made in the superior court of the city and county of San Francisco, and filed with the county clerk. That order was signed: "F. W. LAWLOR, Presiding Judge Superior Court; D. J. TOOHY, Judge of the Superior Court." One o'clock P. M. of the day on which the order was made and filed was the hour designated in the order, as originally made and filed, for the drawing. That day, in department 11 of the superior court, the court opened at 10 o'clock A. M., and upon the opening of the court the clerk read aloud the order, as originally signed, for a grand jury; after which the judge of the court amended the order by changing the hour designated in the order for drawing the jury from 1 o'clock P. M. to 10 A. M. of the day; and upon such change being made on the face of the order, the clerk, in open court, in presence of the judge of the court,—the presiding judge of the departments of the superior court being absent during the proceedings,—did draw from the grand jury box the names of the requisite number of grand jurors, pursuant to the order as amended, and in the manner prescribed by section 219 of the Code of Civil Procedure.

Of the names thus drawn by the officer a certified list was made and delivered to the sheriff, who returned that he had found and summoned 21 of the persons named on the list, to be and appear in department 11 of the superior court, at 10 o'clock A. M., on the tenth day of July, 1885; and at that time the jurors summoned appeared in court. The persons who appeared were summoned by the proper officer, and their names were drawn by a proper officer, in the performance of a ministerial duty required of him by an order of a court of competent jurisdiction. The absence of the presiding judge of the department of the court in which the duty was performed did not invalidate the drawing, nor did the change made by the judge of department 11 in the original order of the hour at which the drawing was to take place divest the court of jurisdiction over the proceeding. The change made, if an irregularity or error in law, was an irregularity which happened, or an error committed, within the jurisdiction of the court, which did not affect the existence of the order under which the clerk acted; and as the order was made and amended within and not without the jurisdiction of the court, it was not void for want of jurisdiction, nor for an excess of jurisdiction. Therefore the names were legally drawn from the grand jury box, and the persons listed and summoned who appeared in court were returned, in pursuance of law, before a court of competent jurisdiction.

But of the persons summoned and who appeared, 13 were excused for cause, and only 6 of the original panel remained. The grand jury was therefore incomplete, and, in order to fill the panel, the judge of the court, by an order entered in the minutes of the court, directed the sheriff to summon 15 persons, from the body of the city and county, to be and appear in department 11 of the superior court on the fourteenth day of July, 1885, to serve as grand jurors. That was done. Under the order the sheriff summoned 15 persons from the body of the city and county, returned their names into court, and the persons who were summoned appeared in court at the hour named in the order. Two of them were excused for cause, and the remaining thirteen, with the six jurors of the original panel, were recognized by the court, and declared to be the grand jury, and as such were impaneled and sworn, and afterwards found and returned into court the indictment against the petitioner.

The petition states that there were, at the time of the proceeding taken for filling the original panel, 135 names in the grand jury box from which a grand jury could and ought to have been drawn, and it is contended that in making the order for summoning the jurors from the body of the city and county the court exceeded its jurisdiction. But the names of a sufficient number of persons to constitute the grand jury having been drawn from the grand jury box, and those persons having been summoned and returned according to law, of whom, for cause, such numbers were excused that there were only present six of the original panel, the court had jurisdiction to fill out the deficiency of the original panel, either by an order for a sufficient number of jurors to be forthwith drawn and summoned to attend the court, or by an order entered in its minutes directing the sheriff forthwith to summon so many good and lawful men of the county, or city and county, to serve as grand jurors, as may be required. Code Civil Proc. §§ 226, 242. There was therefore no excess of jurisdiction in the order made for a special *venire* for summoning the requisite number of jurors from the body of the county to complete the grand jury, instead of an order for having the number drawn from the grand jury box.

We are of opinion that the court below, in exercising its discretion, ought to have ordered the panel to be filled by requiring the clerk, in open court, and in the presence of the judge, to draw the requisite number of names from the grand jury box instead of requiring the sheriff to summon jurors from the body of the city and county. The former course of proceeding is more consistent with the correct administration of justice. But the course adopted by the court was one authorized by the Code. The persons summoned and in attendance were drawn, summoned, and impaneled under a valid law, and according to its provisions, (*People v. McDonell*, 47 Cal. 136; *People v. Ah Chung*, 54 Cal. 398; *Leahy v. Southern Pac. R. Co.*, 3 Pac. Rep. 622;) and as they were qualified to sit as grand jurors, and were rec-

ognized by the court and sworn as a grand jury, the indictment found by it against the petitioner is a good indictment.

It follows that the application for a writ of prohibition must be denied. It is so ordered.

McKINSTRY, SHARPSTEIN, and THORNTON, JJ., concur.

(69 Cal. 129)

MARTIN v. WARD. (No. 9,262.)

Filed March 23, 1886.

1. EJECTMENT—ADVERSE POSSESSION.

In an action of ejectment a finding that defendant repudiated plaintiff's title, and set up title in himself, only about three years prior to the action, and the fact that defendant had failed to pay the taxes required to make out an adverse possession, are fatal to a claim of adverse possession by defendant.

2. TRIAL—DIRECTING VERDICT—NO CONFLICT IN EVIDENCE.

Where there is no conflict in evidence, the court may properly direct a verdict.

3. APPEAL—ERROR WITHOUT INJURY.

It is no ground for reversal on appeal that errors have been committed in the court below, if such errors inured to the benefit of the appellant.

4. SAME—CONFLICTING AND HOSTILE TESTIMONY—PROVINCE OF JURY.

Where the evidence on a trial was radically hostile and conflicting, it is peculiarly within the province of the jury, and the verdict should not be disturbed on appeal.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

*J. N. Thorne*, for appellant.

*J. L. Murphy*, for respondent.

SEARLS, C. This is an action of ejectment to recover a lot of land 25 feet front by 69 feet deep, situated on Douglas street, city and county of San Francisco. The appeal is from a judgment in favor of plaintiff, and from an order denying a new trial. The complaint is in the usual form in ejectment, avers the value of the rents and profits of the demanded premises to be \$200, and demands judgment for possession, for \$500 damages for withholding possession thereof, and for \$200, the value of the rents and profits, and for costs. The complaint is followed by the usual affidavit in verification, but does not appear to have been sworn to, and must be treated as an unverified complaint. The answer contains: (1) A general denial of "each and every allegation in said complaint contained." (2) Sets up that plaintiff's action is barred by sections 318 and 319 of the Code of Civil Procedure of the state of California. (3) A plea of a judgment in favor of defendant, determining the title to the demanded premises in defendant's favor. (4) And for a further and separate defense, and as a cross-complaint, defendant avers, in substance, that in the latter part of 1868, plaintiff being the owner of 75 feet front

by 125 feet deep on Douglas street, in consideration that defendant would build for her, said plaintiff, on said land, a house, agreed to convey to him, the defendant, the northerly one-third, or 25 feet front by 125 feet deep, parcel of said land; that on or about January, 1869, defendant entered into possession of said land so agreed to be conveyed, and has ever since held the exclusive, visible, open, and notorious possession thereof, adverse to all the world claiming title thereto; that the defendant built the house for plaintiff as per the agreement, and that the same was accepted by her; that plaintiff agreed to execute to defendant a deed, but has never done so. Wherefore defendant prays that he be decreed to be the legal owner of the premises, and that plaintiff execute to him a deed, etc.

At the trial it was admitted that the plaintiff was the owner of the land in 1869, at the time of the alleged agreement, and by consent of parties the following special issues were presented to the jury, and answered as herein stated:

"(1) Did the plaintiff, in the latter part of 1868, or the early part of 1869, enter into any agreement with the defendant whereby she promised that she would convey to him the premises on which he now resides, in consideration that he would construct for her, at his own expense, a dwelling-house upon that portion of the premises where she is now residing? Yes. (2) If you find the above in the affirmative, then did the defendant construct a dwelling-house for the plaintiff upon that portion of the premises where she is now residing at his own expense? No. (3) If you find the above in the negative, then did the plaintiff, in the latter part of 1868, or the early part of 1869, agree with the defendant that if he would pay a certain mortgage then existing upon the premises in controversy to the Hibernia Bank, for about the sum of \$300, or refund the amount, she would convey to him the premises upon which he is now residing? Yes. (4) If you find the last above in the affirmative, then did the defendant pay said mortgage or refund the amount thereof to the plaintiff? No. (5) If you find the last above in the affirmative, then did the defendant enter upon said premises in pursuance to said agreement? Yes. (6) If you find that the defendant entered upon the possession of said premises under either of the agreements above mentioned, then has he ever repudiated said agreement, and claimed to hold the premises as his own, prior to the commencement of this litigation? Yes, on or about three years ago."

Upon the coming in of this special verdict the court instructed the jury to find a verdict for the plaintiff for the possession of the demanded premises, and for the rental value thereof, at eight dollars per month, from the date of the filing of the complaint, and thereupon the jury rendered its verdict in favor of the plaintiff as follows: "We, the jury, in the above-entitled cause, do find for the plaintiff, and assess the damages in the sum of \$104." To the instruction of the court directing a general verdict counsel for defendant excepted, and the ruling is assigned as error.

At the trial no evidence was offered in support of the plea of a former adjudication and judgment. Title in plaintiff in 1869 was admitted, and the only evidence upon the subject of the value of the rents and profits was that of the defendant, who said: "I suppose the

property might bring probably about \$10 a month, or thereabouts," and that of Peter Ward, a witness on behalf of plaintiff, who fixed it at eight dollars per month.

The sixth finding of the jury, to the effect that defendant repudiated the agreements and claimed to hold the premises as his own, "on or about three years ago," coupled with the fact that he himself testified that for two or three years before suit was brought he had not paid the taxes on the property, as required by section 325 of the Code of Civil Procedure to make out an adverse possession, are conclusive of defendant's plea of the statute of limitations.

There remained, then, nothing to dispose of, except the value of the use and occupation, and if plaintiff was willing to accept the smallest amount named by any witness, defendant who had fixed the value somewhat higher, should not be heard to complain. Assuming as the court did, the lowest sum named as the value, there was upon *this question* no conflict in the testimony. Where there is no conflict in the evidence, the court may properly direct a verdict. *Chenery v. Palmer*, 6 Cal. 122; *Watson v. Damon*, 54 Cal. 278; *Page v. Tucker*, Id. 121. The error, if any, in instructing the jury as to the amount to be found, inured to the benefit of appellant, and it is no cause for a reversal of the judgment. Upon the other issues the evidence was not only conflicting, it was radically hostile and conflicting, in the extremest sense of the term, and involved considerations peculiarly within the province of a jury to determine; and, under the circumstances, the result reached should not be disturbed, and the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(69 Cal. 112)

GIRDNER and others v. BESWICK. (No. 9,843.)

Filed March 20, 1886.

1. APPEAL—NOTICE, CONSTRUCTION OF.

Where the language of a notice of appeal is "from an order overruling and denying defendant's motion for new trial upon the judgment made and entered in above-entitled action, which said order overruling and denying defendant's motion for new trial was made and entered by said court herein on the sixteenth day of September, A. D. 1884," the appeal taken thereby is from the order denying the motion for a new trial.

2. NEW TRIAL—NOTICE OF INTENTION TO MOVE FOR.

A party has 10 days after the service on him of notice of a decision within which to give notice of his intention to move for a new trial, and therefore, if nothing appears on the record showing service of a notice of the decision, but the notice of intention to move for a new trial properly appears, it cannot be held that such latter notice was not in time, so as to constitute a ground for dismissal of an appeal.

3. SAME—SETTLEMENT OF STATEMENT ON MOTION—CERTIFICATE.

A certificate appended to a statement on motion for a new trial, as follows:

"I hereby certify that the foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor. EDWIN SHEARER, Superior Judge,"—is a sufficient certificate of settlement of the statement within the statute. Code Civil Proc. Cal. § 659, sub. 3.

4. TRIAL—FAILURE TO FIND ON IMMATERIAL ISSUES.

Failure to find on immaterial issues is not error.

5. SAME—FINDINGS OF FACT, WHAT PROPER.

Findings which find only matters of evidence, and are not findings of fact, have no proper place in the findings of the court; and if they do not affect the result of a cause, and afford no ground for reversal, they should be disregarded on appeal, as if they did not appear in the findings at all.

6. APPEAL—FINDINGS—SUFFICIENCY OF.

Various findings reviewed, and held sufficient.

7. SALE OF ANIMALS—WARRANTY OF NUMBER—ACTION FOR BREACH—DAMAGES.

The plaintiffs bought of the defendant a band of animals which, by his agreement, the latter guaranteed should be 170 head, less five head of horses, which he was allowed to retain. There were then sold a band of 165 animals. Of these plaintiffs got only 117 head, leaving a difference of 48 head, for the value of which, and not for the value of 53 head, the plaintiffs were entitled to recover as damages, and the trial court erred in allowing the value of more than 48 head.

In bank. Appeal from superior court, county of Siskiyou.

*Wm. McConaughy and J. V. Brown*, for appellant.

*W. I. Nichols and H. B. Warren*, for respondents.

THORNTON, J. This action was brought to recover \$2,000 damages for breach of a contract entered into between plaintiffs and defendant. The contract is as follows:

"\$4,500.

SISKIYOU CO., CAL., June 20, 1882.

"For and in consideration of the sum of four thousand five hundred dollars, in hand paid, I this day sell my entire band of horses, mules, and jack to J. Girdner and J. W. George, except five head of horses reserved, and I hereby agree, when gathered up, that there shall be one hundred and seventy head, not including the colts of 1882, brand,—hat brand, (—): provided, that there shall not be some disease to kill off, or that it becomes known that they have died from any other cause.

[Signed]

"R. BESWICK."

The breach assigned is that at time of sale by defendant to plaintiffs there were not more than 119 head of the band of animals sold, as defendant well knew, and that plaintiffs, on gathering up said animals, got no more than 117 head of said band, including 2 that had died. From this it appears that there was a deficiency of 53 head. The court gave judgment for \$2,000, the value of the 53 head, in favor of plaintiffs. The defendant moved for a new trial, which was denied.

If there is any appeal herein it is from the order denying defendant's motion for a new trial. It is contended that there is no such appeal. The language of the notice of appeal is: *From an order overruling and denying defendant's motion for new trial upon the judgment made and entered in above entitled action, which said order overruling and denying defendant's motion for new trial was made and entered by said court herein on the sixteenth day of September, A. D.*

1884." The notice was properly entitled in the cause. An order denying the motion for a new trial on the sixteenth of September, 1884, appears in the transcript. The notice in its last clause refers to this order by its correct date as then made, and speaks of it as an order overruling and denying defendant's motion for new trial, and thus defines it the order from which the appeal is taken. It would be an unwarranted construction of this language to hold that this was not the order appealed from. It was plainly intended as an appeal from this order. There is nothing in the language used to mislead the plaintiffs or their counsel as to the order intended to be appealed from. We feel bound to hold it as an appeal from the order denying the motion of defendant for a new trial. The undertaking on appeal, though inartificially drawn, is in our judgment sufficient.

The only appeal here, as above stated, is from the order of the court denying defendant's motion for a new trial. It is now urged that this appeal should be dismissed because the notice of intention to move for a new trial was not given in time. The only notice of intention which we can take notice of here is that referred to in the order denying the motion for a new trial. The other notices appearing in the transcript we cannot take notice of because they are not embraced in the statement or bill of exceptions. Such notices are not a part of the judgment roll, and they must be made to appear as part of the record by a statement or bill of exceptions, as other matters which are not a part of the judgment roll must be made a part of the record. The order denying the motion for a new trial was made on the sixteenth of September, 1884, and is as follows:

"(Title of Court and Cause.)

"At a regular term of the honorable superior court, continued and held within and for said county, at Yreka city, the county-seat thereof, on Tuesday, September 16, A. D. 1884, court met pursuant to adjournment, and was duly called by the sheriff. Present: Hon. EDWIN SHEARER, superior judge, and officers of the court.

"In pursuance of the notice of motion to move for a new trial, filed herein on the sixteenth day of August, A. D. 1884, the defendant, by W. I. Nichols and H. B. Warren, his attorneys, moves the court to set aside the decision and judgment rendered in this action, and grant a new trial thereof upon the following grounds, to-wit: (1) Insufficiency of the evidence to justify the decision, and that the decision was against law. (2) Errors in law occurring at the trial, and excepted to by defendant; and that the statement on motion for new trial, as settled and allowed by the judge of said court, and filed herein on the fifteenth day of August, A. D. 1884, and the pleadings, papers, and records in said case, are herewith presented in support of said motion.

"W. I. NICHOLS,

"H. B. WARREN,

"Attorneys for Defendant.

"And said motion having been submitted to the court for judgment thereon, it is ordered and adjudged by the court that said motion be, and the same hereby is, overruled and denied. EDWIN SHEARER, Superior Judge."

The notice of intention herein referred to is stated to have been filed on the sixteenth of August, 1884. The decision herein was filed on the seventh of March preceding. The defendant had 10 days after notice of the decision of the court within which to give notice of his intention to move for a new trial. When this notice was given does not appear. In fact, it does not appear that any notice of the decision was ever given; nor does it appear that any objection was ever made in the court below that this notice of intention was not given in time. Under these circumstances we cannot hold that this notice was not in time, and the appeal cannot be dismissed on the ground that it was not so given. We are bound to hold, nothing appearing to the contrary, that the notice referred to in the order above quoted was in all respects regular, and was given in time.

It is contended that it does not appear that the statement was properly settled. This contention is directed at the certificate of the judge appended to the statement, which is as follows:

"I hereby certify that the foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor.

"EDWIN SHEARER, Superior Judge."

We are of opinion that this certificate accords with the statute. Code Civil Proc. § 659, sub. 3.

The contention presented herein for consideration is that the court below failed to find on certain material issues. It is said that the complaint contains the following allegation:

"That plaintiffs are informed and believe, and upon their information and belief aver, that the defendant's band of animals so sold as aforesaid to plaintiffs did not, at the time of said sale, or at any time thereafter, consist of 170 head, nor of more than 119 head, exclusive of colts foaled in the year 1882, and that defendant well knew that he did not own more than 119 head of such animals at the time of said sale."

It is also said that this allegation is denied. The only attempt at denial to which we have been referred or which we can find is as follows:

"And upon information and belief avers that he, said defendant, at the time of the making of said sale, was the owner of horses and mules, branded with his brand, and numbering about 170 head in the aggregate, exclusive of the colts foaled in 1882."

The issue as to the number of horses defendant owned at the time of the sale is immaterial. The averment in the complaint to that effect is of immaterial matter, and, conceding for the argument that it was denied, the issue thus joined would be immaterial. The contract was that the animals referred to should be, when "*gathered up*," 170 head, and not at the time of sale. We cannot conclude that the sale and the gathering were to be simultaneous. The contract refers to the *gathering up* as something to be done after it (the contract) was entered into. The fair inference from the language of the contract is that the animals spoken of in it were dispersed over a range from which it was necessary to collect them. As to that part of the

allegation above quoted from the complaint, "that defendant well knew that he did not own more than 119 head of such animals at the time of sale," the knowledge of defendant here averred is not denied at all. If it had been denied, it would have raised an issue entirely immaterial, for the reasons above given as to the other part of the allegation. The failure to find on immaterial issues is not error.

The third and fourth findings find only matters of evidence. They are not findings of fact, and have no proper place in the findings. They do not, however, affect the result and afford no reason for a reversal of the order. They should be and are disregarded by this court, as if they did not appear in the findings at all.

The findings as to the number of animals gathered up are in form sufficient. The requisite facts are found in them in the following words:

"That said plaintiffs have made thorough search in their efforts to gather up the band of animals so purchased by them of said defendant, over the different ranges where said animals were known to range, and did range, and that plaintiffs have used diligence, and made earnest efforts to find all the animals purchased by them of the defendant. That of the whole number of animals purchased by plaintiffs of defendant, to-wit, one hundred and seventy head, plaintiffs have recovered one hundred and seventeen head, leaving fifty-three head of said animals, which plaintiffs have not recovered, and were not able to find and recover."

The above findings are not lacking in sufficiency. The court finds that 53 head of the animals sold were not gathered, and that plaintiffs, on a thorough search, were not able to find and recover them. It finds the value of these 53 horses to be \$2,000, and at that sum assesses the damages to plaintiffs. The plaintiffs bought of the defendant a band of animals which, by his agreement, the latter guaranteed to be 170 head, less 5 head of horses which he was allowed to retain. There was then sold a band of 165 animals. Of these plaintiffs got one 117 head, leaving a difference of 48 head, for the value of which, and not for the value of 53 head, the plaintiffs were entitled to recover as damages.

We will add here, in explanation, that the 2 head, which it is admitted by the pleadings died between the time of sale and the gathering, should be counted and were properly included in the 117 head as gotten by plaintiffs. The plaintiffs having bought the band of animals on the twentieth of June, 1882, from that time the death of any of them was at their risk, and they must suffer the loss of those which died. The court seems to have so ruled, and in doing so ruled correctly. But in allowing plaintiffs the value of more than 48 head the court erred, and for this error the order must be reversed, and the cause remanded, with directions to the court below to find from the evidence heretofore offered in the cause, and any further evidence which may be offered therein, the value of the 48 head, and having found the same, enter judgment for the sum so found as damages in favor of plaintiffs. Ordered accordingly.

We concur: McKee, J.; Sharpstein, J.; McKinstry, J.

Ross, J., (*concurring*.) The record does not contain the notice of intention to move for a new trial, nor does the statement on motion for new trial recite the giving of such notice, but the plaintiffs' attorney *accepted* the draft of the statement without any objection, and at no time in the court below objected to the settlement, or consideration of the statement, on the ground that proper notice of intention to move for a new trial had not been given. The court below, in denying the motion, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. We must presume, therefore, that the court found that proper notice was given, or that defendant had waived the objection. *Gray v. Nunan*, 63 Cal. 220.

Upon the merits, I concur in the conclusions reached by Mr. Justice Thornton.

## SUPREME COURT OF COLORADO.

(9 Colo. 38)

ROCKWELL v. GRAHAM.

Filed February 26, 1886.

## 1. EVIDENCE—TESTIMONY AFTER STIPULATION.

An offer of evidence in contravention of a stipulation between the parties during the trial will not be allowed.

## 2. EASEMENT—APPLICATION FOR GOVERNMENT TITLE.

An action for an easement cannot be properly brought to defeat the application of a party for a government title to a placer claim.

Appeal from district court, Clear Creek county.

The defendant having made application for the government title to a certain placer claim, the plaintiff filed an adverse claim, and brought this action for a portion of the premises, to-wit, "for one mill-site, 250 feet square, \* \* \* and the *land* for a mill-race from said mill-dam \* \* \* to said mill-site." Trial by jury, and instruction by the court to find for the defendant. Verdict and judgment for defendant.

*L. C. Rockwell*, for appellant.

*Hugh Butler*, for appellee.

ELBERT, J. The court did not err in instructing the jury to find for the defendant. The evidence does not show title in the plaintiff to either the mill-site or the *land* for the mill-race. The evidence does show title in the plaintiff to a "right of way for a flume to conduct water along the creek to what is known as the 'Railey Mill.'" This is the language of the reservation made in Railey's deed by Dean, his attorney in fact, to Montague, the grantor of the defendant, and (within the boundaries of the premises in dispute) this is all that passed by Robert Railey's subsequent deed to Becker, the grantor of the plaintiff.

This is an easement. It is not what is declared on; evidence of it does not support the issue; nor is such a right ground for an adverse claim being fully protected by the provisions of the federal laws. Rev. St. §§ 2339, 2340.

The refusal of the court to allow proof of a pre-emption by Becker is assigned as error. On the trial of the cause "it was stipulated and agreed in open court, by the respective parties, that the plaintiff and defendant claim title from Tarleton Railey and Mary Railey, and that they were the common grantors to plaintiff and defendant. The nature of Becker's pre-emption, the law under which and the purpose for which it was made, does not appear. Presumably the offer was made for the purpose of showing *title* by pre-emption. If so, it was not admissible as being in contravention of the stipulation above stated.

As to the third assignment, it is sufficient to say that the description of the premises contained in a deed from Dougherty to Montague is referred to by Dougherty in his testimony, apparently for the purpose of identifying the premises conveyed by Dean, attorney in fact, with the premises conveyed to Montague, and by Montague to the defendant; the premises having been described in the two last-named deeds in different terms. Possibly the deed itself was introduced in evidence for the same purpose, but this does not clearly appear. We do not see in this any ground for reversal.

These are all the assignments of error it is necessary to notice. The judgment of the court below is affirmed.

(9 Colo. 73)

SPRUANCE, State Auditor, etc., *ex rel.* THOMAS, Atty. Gen., v. FARMERS' & MERCHANTS' INS. CO.

Filed March 26, 1886.

1. FIRE INSURANCE—MUTUAL ASSOCIATIONS—ESSENTIAL CONDITION UNDER THE LAWS OF COLORADO.

Since the method of taking risks in the mutual association of insurance is not declared by statute, and since it is not required to be stated in the articles of incorporation, its selection must have been left to itself. The only limitation affecting the plan which may thus be chosen is that it shall include the principle of mutuality.

2. SAME—PRINCIPLE OF MUTUALITY.

The principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss.

3. SAME—ASSOCIATIONS UNDER SECTION 1704, GEN. ST.

Mutual associations organized under section 1704 of the General Statutes may do business upon a cash premium plan.

4. SAME—SUBJECT TO APPLICABLE PROVISIONS UNDER THE ACT.

While mutual associations organized to insure against loss of property are not required by the law to have or to accumulate a reserve fund beyond the amount reasonably necessary to meet current losses and expenses, in order to do business within the state, they are subject to all provisions of the act that may be found "applicable."

5. SAME—EXTENT OF POWERS OF SUPERINTENDENT OF INSURANCE.

The superintendent of insurance has almost unlimited power in the investigation of the affairs and management of mutual associations, and enumeration of matters to be considered by the superintendent in such investigations.

Original agreed case.

In the year 1883 the Farmers' & Merchants' Insurance Company was duly organized as a mutual fire insurance association under the following section of our insurance statute:

"The provisions of this act shall not be construed to prevent any number of persons, not less than twenty, from associating together for the purpose of forming an incorporated company for the purpose of mutual insurance of the property of its members. When persons so associated shall have complied with the provisions of this act, so far as [they] are applicable to such mutual companies, the superintendent of insurance shall commission the persons named in the certificate of incorporation, or a majority of them, to open books, to receive propositions, and enter into agreements in manner herein-

after specified. But no company so organized shall commence business until *bona fide* agreements have been entered into for insurance with at least one hundred individuals, covering property to be insured to the amount of not less than fifty thousand dollars."

The association commenced the transaction of business, using both the assessment and cash plans for the payment of premiums for insurance. In the year 1884 the superintendent of insurance, on examination, discovered that the company was in an insolvent condition, the receipts having been absorbed by the management, so that nothing remained with which to pay losses; nor was indemnity against loss in any manner provided.

Upon a reorganization of the company the following resolutions were adopted by the policy-holders as embodying the plan upon which the business should be transacted:

"Resolved, that for the purpose of equitably and mutually indemnifying each other, and that each member shall be required to do and perform his part, to the end that all may be equally and mutually benefited, each member shall pay in as premium at a ratable percentage on the amount of insurance obtained by each, varied as the risks may vary in hazard, based upon the maximum cost of insurance, and such percentage of rates to be established and designated by the manager and secretary of this association on the foregoing basis; and that each policy-holder, upon becoming a member, be required to pay in such stated sum upon insurance received, in cash, note, or notes for the amount, to be paid within a reasonable time, subject to all the conditions, rules, and regulations adopted by the company: provided, that the amount so received shall be in full of all individual liability upon the part of each member.

"Resolved, further, that should the aggregate amount of percentage deposited by each member and all of the policy-holders amount to a greater sum than may be necessary to pay all expenses and losses from time to time, and to pay all accruing losses and expenses upon all unexpired risks, that such unneeded surplus on hand shall, from time to time, be, by the board of directors, equitably and mutually distributed among the policy-holders at the time of such distribution in proportion to their respective ratable interests in such surplus.

"Be it further resolved, that the board of directors be, and are hereby, requested to so alter or modify the existing by-laws as to conform them to the manner of conducting the business of the company as in these resolutions expressed."

At the commencement of this action the association had upwards of 2,000 members, who became such under these resolutions by paying cash premiums in full of their insurance, and in full of all liability. The proceeding in this court is in pursuance of the statute providing for agreed cases. It is conceded in the agreed statement that the affairs of the company since its reorganization have been ably managed, and that it is now in a condition perfectly satisfactory to the superintendent of insurance. The object of the parties in instituting the proceeding is to determine whether, under the laws of Colorado, an insurance company, the membership of which consists of the policy-holders, can do business upon the plan provided in the foregoing resolutions.

*Theo. H. Thomas, Atty. Gen., (Thornton H. Thomas, of counsel,) for plaintiff.*

*B. F. Montgomery, for defendant.*

HELM, J. The purpose of the legislature in providing for the organization and maintenance of a state insurance department was to protect the interests of the large number of persons within the state who patronize corporations engaged in the business of insurance. Both joint-stock companies and mutual associations are recognized. As to the former, the object of the statute is accomplished in two ways: *First*, through the supervision and authority therein conferred upon the superintendent of insurance; and, *second*, by the provisions making an actual paid-up cash capital of at least \$200,000 a prerequisite to the transaction of business, and carefully guarding the investment or loan thereof. The statutory requirements relating to such paid-up cash capital do not apply to mutual associations. Neither are there any corresponding sections providing for a reserve fund in connection with the latter class of companies. It is the customary, if not the universal, rule elsewhere to specify in statutes authorizing the organization of mutual associations the leading features of a plan upon which they shall take risks and conduct business. This plan generally includes specifications relating to a capital or reserve fund, either in the hands of the members and represented in the treasury by assessable premium notes, or in the hands of designated officers. The statute before us, however, is surprisingly deficient in this particular. The only section thereof referring by name to mutual companies organized after its passage contains a statement showing that the legislature intended to make such provision, at least so far as to specify the manner of entering into agreements; but either by reason of inadvertence, or a subsequent change of purpose, this subject was left wholly uncovered.

Since the method of taking risks in the mutual association is not declared by statute, and since it is not required to be stated in the articles of incorporation, its selection must have been left to the company itself; and the only limitation affecting the plan which may thus be chosen is that it shall include the principle of mutuality. We need hardly suggest that an association which did not embrace the foregoing principle would not be a "mutual" company within the meaning of the statute. An important inquiry at this juncture, therefore, is, what are the essential elements involved in the recognition of this principle? We answer that the principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss. *Union Ins. Co. v. Hoge*, 21 How. 35; *Mygatt v. New York Protection Co.*, 21 N. Y. 52; *Ohio M. Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348; *White v. Haight*.

16 N. Y. 310; May, Ins. § 548, citing three of the foregoing cases; Ang. Ins. § 413.

Persons so associated are said to be members of the company. They have, or may have, a voice in the management of its affairs, and are practically both insurers and insured. All are interested in what may be termed the profits and losses of the association; for if the assessable note system in any of its forms be adopted, the demands upon each member to meet assessments, during the life of his policy or risk, are large or small, according to the multiplication or diminution of losses; while, if a cash premium plan prevail, each member has an interest in the surplus premium fund remaining after payment of losses and expenses; and, of course, the amount of such surplus is governed by the extent of the losses suffered. The policyholder in the joint-stock company is not thus situated. He pays a certain definite sum as premium, and the company agrees therefor to pay him a certain specific amount in case of loss. He has no voice whatever in the management of the business, and whether the profits or losses are large or small does not concern him, provided the company remains able to liquidate any losses contemplated by his contract. See authorities cited, *supra*. The principle of mutuality has probably been more often recognized and enforced in these associations through the assessable note system in some of its numerous forms; but, as shown by the foregoing suggestions and authorities, it is perfectly consistent with the payment of cash premiums. The latter method of making contracts and taking risks has been and is extensively recognized in the United States; and sometimes the same mutual company is authorized by statute to invoke both methods in the transaction of its business. "The present tendency is to pay the entire amount (of premiums) in cash." Bliss, Ins. § 427. A different position concerning the consistency with the mutual principle of doing business upon a purely cash basis seems to be announced in *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354. But, with all due respect to the able court promulgating that opinion, we think that the view above taken is supported by the weight of authority, and also by the better reason.

The conclusion seems to be inevitable, that, as the law now stands, mutual associations, organized under section 1704 of the General Statutes, may do business upon a cash premium plan. The objections of the attorney general are not without force, but, in view of the circumstances, we do not deem them controlling. It is true that premium notes represent a reserve fund in the hands of the members; and that, under this method of doing business, there is therefore a kind of capital as security against losses. It is also substantially true that when the premiums are paid in cash there is not, in the absence of legislation, necessarily any such fund or indemnity; a majority of the members or a majority of the directors may do with the surplus of such premiums, remaining after the payment of losses and expenses, as

they shall deem advisable. They may from time to time return the same to the members, or jeopardize its loss through unwise loans and investments. It would be more in harmony with the spirit of the act to suppose that the legislature intended mutual companies to have some sort of a reserve fund at the date of the organization, or thereafter to accumulate the same. But, as already suggested, this purpose may be, and usually is, effectuated under both methods of making contracts. Therefore, supposing the legislature intended to require that mutual companies do business upon one only of the foregoing general plans, how shall we determine which of the two would have been selected? The act itself contains nothing that points with reasonable certainty to either as being the exclusive choice. Our opinion in the matter might not correspond with the legislative judgment, and our selection might represent the converse of the legislative intent. Besides, our action, in such case, would savor more strongly of judicial legislation than of judicial interpretation. It would be supplying something which the legislature, whatever may have been its purpose, did not include in the act. Nor do we feel at liberty to hold that the superintendent of insurance is clothed with authority to supply the missing statutory provision. To say that he may prescribe the plan upon which mutual insurance risks shall be taken would be to authorize what might appropriately be termed executive legislation; for, though clothed with a sort of judicial power, he is essentially an executive officer.

But while mutual associations organized to insure against loss of property are not required by the law to have, or to accumulate, a reserve fund beyond the amount reasonably necessary to meet current losses and expenses, in order to do business within the state, they are subject to all provisions of the act that may be found "applicable." They must make annual reports to the superintendent of insurance, showing their assets, liabilities, moneys received and expended, character of business, etc. The superintendent of insurance has almost unlimited power in the investigation of their affairs and management. Until they have complied with the law, he should refuse permission to transact business; and the privilege being granted, if they disobey the law, or become financially unsound, he must revoke the same. In passing upon such financial condition, the superintendent will take into consideration all appropriate *data*,—such, for instance, as the amount of cash received, and the balance on hand; the manner of loaning or investing surplus premiums, having reference to section 1695, Gen. St., the first part of which, at least, is applicable; the extent of the business transacted, including the number and character of risks taken; the running expenses; probable losses upon unexpired risks, as well as losses accrued, etc.

It is, of course, true that the protection thus given the assured is not so complete as that provided in the case of joint-stock companies; but it is likewise true that if the officer mentioned performs his

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duty in the premises, no great hardship or injury is likely to result prior to the next session of the legislature. Then the omission, if unintentional, may be rectified by that branch of the government in which is lodged the power of enacting laws.

The question propounded by the parties is answered, and judgment will be entered accordingly.

(9 Colo. 33)

**STIMSON v. HELPS and others.**

Filed February 26, 1886.

**1. CONTRACT—FRAUD—FALSE REPRESENTATIONS MADE IN IGNORANCE.**

The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury.<sup>1</sup>

**2. SAME—ELEMENTS OF FRAUDULENT REPRESENTATION.**

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false, if such party made the false representation not knowing whether it was false or not.<sup>1</sup>

**3. APPEAL—APPEAL TO DISTRICT COURT AFTER NOTICE OF APPEAL TO SUPREME COURT.**

The action of the county court in refusing to allow an appeal to the district court after the party seeking it had given notice of an appeal to the supreme court, and time has been allowed in which to perfect it, is not an error upon such appeal to the supreme court.

Appeal from county court, Boulder county.

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W.  $\frac{1}{4}$  of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defend-

<sup>1</sup> See note at end of case.

ant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth \$2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased; then and thereby deceived them, and damaged them, in the sum of \$2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of \$2,000, and costs.

*Wright & Griffin*, for appellant.

*G. Berkley*, for appellees.

ELBERT, J. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. *Bigelow*, Fraud, 57, 60, 63, 67, 68, 87; *Kerr*, Fraud & M. 54 *et seq.*; 3 *Wait*, Act. & Def. 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. *Kerr*, Fraud & M. 54 *et seq.*, and cases cited; *Bigelow*, Fraud, 63, 84, 453; 3 *Wait*, Act. & Def. 438 *et seq.*; 2 *Estee*, Pr. 394 *et seq.* "Fraud" is a term which the law applies to certain facts, and where, upon the

facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. *Kerr, Fraud & M.* 366 *et seq.*, and cases cited; 2 *Estee*, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

#### NOTE.

A contract secured by false and fraudulent representations cannot be enforced. *Mills v. Collins*, (Iowa,) 25 N. W. Rep. 109.

A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. *Seeley v. Reed*, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. *Singer Manufg Co. v. Yarger*, 12 Fed. Rep. 487. See *Chandler v. Childs*, (Mich.) 3 N. W. Rep. 297; *Cavender v. Roberson*, (Kan.) 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. *Dunn v. Remington*, (Neb.) 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assessor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. *Buckner v. Street*, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. *Seeberger v. Hobert*, (Iowa,) 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. *Hall v. Johnson*, (Mich.) 2 N. W. Rep. 55. See, to same effect, *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Seeberger v. Hobert*, (Iowa,) 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. *Heineman v. Steiger*, (Mich.) 19 N. W. Rep. 965.

Where the vendor honestly expresses an incorrect opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. *Collins v. Jackson*, (Mich.) 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraud-

ulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. *Bank of Barnesville v. Yocum*, (Neb.) 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule. *Cooper v. Schlesinger*, 4 Sup. Ct. Rep. 300.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. *Britton v. Brewster*, 2 Fed Rep. 160.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. *Dowling v. Lawrence*, (Wis.) 16 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. *Wickham v. Morehouse*, 16 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. *Taylor v. Saurman*, (Pa.) 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of *Cook v. Churchman*, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

**SUPREME COURT OF NEW MEXICO.**

(3 N. M. [G11d.] 877)

**BOARD OF CO. COM'RS OF VALENCIA Co. and others v. ATCHISON, T.  
& S. F. R. Co.**

Filed March 29, 1886.

**1. TAXES—RAILROAD COMPANY—LEASED PROPERTY—ASSESSMENT—LAW OF NEW MEXICO.**

Section 1812, Comp. Laws N. M., defines in what way and to what persons property subject to taxation shall be listed and assessed, and declares, among other things, that property under mortgage or lease is to be listed by, and taxed to, the mortgagor or lessor, unless listed by the mortgagee or lessee.

**2. SAME—DESCRIPTION OF PROPERTY.**

In the assessments of the property of persons who fail to render or return a list, the description or lists made by the assessor, according to his best information, need not be strictly accurate, and the valuations correct, but it is essential to the validity of the tax that *some* description or list be made.

**3. SAME—SUIT TO ENJOIN COLLECTION—TENDER.**

In a suit to enjoin the collection of taxes, when the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes.

Error to district court, Bernalillo county.

*E. A. Fiske* and *H. L. Warren*, for plaintiff in error.

*H. L. Waldo* and *James Hagerman*, for defendants in error.

HENDERSON, J. The Atchison, Topeka & Santa Fe Railroad Company filed a bill in the district court of Valencia county against the board of commissioners of that county, Patrocino Luna, sheriff and collector of taxes, and C. C. McComas, district attorney of the Second district. The object of the bill was to enjoin the collection of certain alleged illegal taxes levied against it. The bill states that the Atchison, Topeka & Santa Fe Railroad Company is a Kansas railroad corporation, duly authorized to do business in this territory; that the New Mexico & Southern Pacific Railroad Company is a New Mexico company, organized and existing under its laws; that the New Mexico & Southern Pacific Railroad Company, under its charter, constructed a railroad, beginning at a point in the Raton Pass in the northern portion of the territory, extending south through Valencia county to San Marcial, in Socorro county, completing its line to San Marcial in the year 1880. The bill further avers that by reason of the construction of said line of road the company became and was, as to all its property, exempt from taxation for the period of six years from 1880, the year of its completion, under an act of the legislature passed in 1878. It is further alleged that the complainant company, soon after the completion of this line of road, entered into a contract of lease with the New Mexico & Southern Pacific Company, by the terms and conditions of which all the property of the latter company was turned over to the possession of the former; and that the complainant had ever since been in the possession of said line of road, and

all its property, operating it as a common carrier under the charter of the lessor company, and discharging fully and faithfully its obligations and duty to the public as a railroad corporation; that all the property embraced in the several pretended tax assessments belong to the New Mexico & Southern Pacific, and not to the Santa Fe Company, except articles mentioned in an exhibit attached to the bill, of the value of \$183.12, of which the assessors had made no list or description whatever in their return to the county board. It is further alleged that the assessments for the years 1881, 1882, and 1883 are each and all void for two reasons: *First*, because the property attempted to be assessed consisted of lands which were in no manner described, and personal property of various kinds, and different values, while the assessments contained no list or description of it whatever; *second*, because the persons assuming to make them had no authority to do so. It averred exemption from taxation by the complainant under and by virtue of the same legislation asserted on behalf of the New Mexico & Southern Pacific Company.

All of the defendants joined in a demurrer to the bill, which was overruled, and a decree entered as prayed, enjoining the collection of the taxes. Defendants brought error.

It will be seen from the allegations of the bill that the equities relied upon as grounds for an injunction and relief as prayed rested upon three propositions: *First*, that the property sought to be subjected to the tax was exempt, whether in the hands or possession of the Atchison, Topeka & Santa Fe, or in that of the New Mexico & Southern Pacific Company; *second*, that even admitting the legal validity of the tax attempted to be imposed upon the property, it should have been listed by, and taxed to, the New Mexico & Southern Pacific Company, the owner and lessor, and not to the Atchison, Topeka & Santa Fe Company, the lessees in possession; *third*, that the assessments were not only irregular, but void.

In view of the fact that this court, in what appears to have been a well-considered opinion, has held that the exemption set up and relied upon here on behalf of the New Mexico & Southern Pacific Company was valid, (*Board of Co. Com'rs of Santa Fe Co. v. New Mexico & S. P. R. Co.*, 2 Pac. Rep. 376,) and the further fact that the New Mexico & Southern Pacific Company is not before us in this case, we are not disposed to enter into any discussion or consideration of the question of exemption, as applied to that company, until an issue shall be made on a regular assessment of the property claimed to be exempt.

The second proposition, as indicated above, is apparently without serious difficulty in its determination. To avoid the force of the statute on the subject of the taxation of property under lease, counsel for plaintiff in error press upon our attention the fact that the bill does not disclose the terms or conditions of the lease, and that, as a legal consequence, it must be construed most strongly against the

pleader, and that thus construed the lease will be considered one for a long term, and the conditions favorable to the lessee; that the legal effect of it is and was to convey the unexpired term of the lessor's corporate existence under its charter, or at least the substantial beneficial estate in the leasehold property. In other words, they contend that the lease must be treated, for the purposes of this suit, as a deed, and that, in legal effect, the transfer was a sale, and as such the immunity from taxation, if any ever existed in the lessor company, did not pass to the lessee. There would be strong grounds for this position if the bill could be treated in other respects as silent on the subject of ownership of the property. It, however, in most distinct and emphatic terms, declares that the Atchison, Topeka & Santa Fe Company does not own any portion of the property against which the tax was levied, except the small amount stated. We cannot, by construction, impute title or beneficial estate in the sense for which counsel for plaintiff in error contend, in the face of admitted averments, such as are made here.

Section 1812, Comp. Laws, defines in what way and to what persons property subject to taxation shall be listed and assessed, and concludes as follows: "Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee." There is no claim made that the Atchison, Topeka & Santa Fe Company listed this property for taxation, and then became subject to the tax. The demurrer admits the lease and the ownership of the property by the New Mexico & Southern Pacific Company. With these facts conceded, we cannot hold the complainant company bound by the assessments, unless the legislature clearly intended to impose a double tax,—one to the lessor and one to the lessee. We find nothing in the statutes to warrant us in so declaring. The rule on this subject is well stated by Judge COOLEY, as follows:

"It has very properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute, or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly, and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes it has been held to follow as a legal conclusion that the legislature could not have intended the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time. This is a sound and just rule of construction, and it has been applied in many cases where, at first reading of the law, a double taxation might seem to have been intended." Cooley, *Tax'n*, 165.

The legislature having declared that property under lease should be "listed by and taxed to the lessor," it follows that it could not be "taxed to" any other person or corporation, within the meaning of the statute, unless voluntarily listed by the lessee.

Were the assessments void? They were returned as follows:

For 1881, A., T. & S. F. R. R. Co.				
Valuation of property sworn to,	-	-	-	\$1,000,000 00
For 1882, A., T. & S. F. R. R. Co.				
Assessed value of property,	-	-	-	500,000 00
Total value of real estate,	-	-	-	250,000 00
Total value of personal property,	-	-	-	250,000 00
For 1883, A., T. & S. F. R. R. Co.				
Assessed value of property,	-	-	-	500,000 00
Total value of real estate,	-	-	-	250,000 00
Total value of personal property	-	-	-	250,000 00

The bill charges that the persons making these assessments willfully, oppressively, and illegally attempted to assess, as against the complainant, property it did not own, to-wit, real estate in the county of Valencia; and did willfully, arbitrarily, illegally, and fraudulently attempt to assess personal property in said county, owned by complainant, greatly in excess of, and out of proportion to, the rate at which all other property was valued for the purposes of taxation in said county, to-wit, 500 per cent. above.

Section 2822, Comp. Laws, requires the assessor of the county, between the first day in March and the first day in May, in each year, to ascertain the names of all taxable inhabitants, and all property in the county subject to taxation. To this end he is to visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately: (1) All property belonging to, claimed by, or in the possession or under the control or management of, such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier, or managing agent. (2) The county in which such property is situated, or in which it is liable to taxation. (3) A description of it by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person, and a detailed statement of his personal property, including average value of merchandise for the year ending March 1, number of horses and mules, sheep, cattle, swine, and other animals, etc. Section 2823 provides that the list thus made must be sworn to. Section 2824 makes it the duty of the assessor to furnish the taxable inhabitant with a blank for such list, which is required to be filled out and delivered to the assessor on or before the last Monday in April. Then follows section 2825, in the following language:

"If any person liable to taxation shall fail to render a true list of his property, as required by the three preceding sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain. And such person shall be liable, in addition to the tax so assessed, to a penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the tax of such person."

While it is true that the courts will not be nicely or overscrupulously technical in passing upon questions of mere formality and reg-

ularity in the methods adopted by a class of subordinate officials in the performance of their duties, it is not, however, their duty to consider as done in the manner required by law that which should have been done in so important a matter as the assessment of property for taxation. The legislature is charged with the duty of raising revenue for the support of the government, and it is its peculiar function to lay taxes and provide the means for its collection. To that end it may and has prescribed the initial step in order to subject property to the burdens of taxation, and that step is assessment. A description or list of the property, with a valuation attached, is a necessary act, without which a levy cannot be made and enforced. On this subject Judge COOLEY says:

"Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are mere nullities. It is therefore not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity. \* \* \* As the course unquestionably is prescribed in order that it may be followed, as without it the citizen is substantially without any protection against unequal and unjust demands, the necessity for a strict compliance with all important requirements is manifest." Cooley, Tax'n, 259, 260.

It does not follow, however, that in the assessments of the property of persons who fail to render or return a list that the description or lists made by the assessor, according to his best information, must be strictly accurate, or the valuations correct, but it is essential to the validity of the tax that *some* description or list be made. In this case the assessment for 1881 consisted of a single item, valued at \$1,000,000. For 1882 and 1883 the assessor divides the gross sum into two classes,—real and personal,—giving to each a value of \$250,000. Construing these assessments in the most favorable and liberal way, can they be treated as valid? The statute requires real estate to be listed by subdivisions, or some other way sufficient to identify it. It also requires, as we have seen, that a list or description of personal property, as well as its value, must be given. There can be no sort of doubt about the insufficiency of the attempted assessment of the real estate. No deed could be given if sold at delinquent tax sale. No possession could be taken under such a description. There is a value attached to the personal property for the years 1882 and 1883, but there is no effort at description. It is possible to conceive a single piece of railroad property to be worth \$250,000, but the owner is certainly entitled to know what piece it is, so that he might, if valued too high, seek his remedy for relief before some proper tribunal or body. Again, the statute makes it the duty of the assessor to ascertain the names of all taxable inhabitants of his county, and *all the property in his county subject to taxation*. This is not an impossibility, so far as taxable inhabitants and tangible property are con-

cerned. This assessment does not purport to be founded upon mere credit. It is founded, as we understand it, upon tangible estate. From no point of view can these assessments be treated as legal and binding upon either railroad company.

It is urged that in any event the judgment below is erroneous because complainant admitted the ownership of property of the value of \$183.12, and did not tender any sum before the institution of the suit, nor in its bill. This is not the rule where assessments are void. In a suit to enjoin the collection of taxes, where the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes. The cases in which a tender has been required were those where there was an excessive, as distinguished from a void, assessment. *Albany Nat. Bank v. Maher*, 20 Blatchf. 341-343; S. C. 9 Fed. Rep. 884.

The judgment is affirmed.

LONG, C. J., and BRINKER, J., concurred. ●

## SUPREME COURT OF IDAHO.

(2 Idaho [Haab.] 256)

LUFKINS v. COLLINS and others.

Filed March 8, 1886.

## 1. REPLEVIN—VERDICT—EVIDENCE.

The verdict of a jury against the defendants, in an action for the recovery of personal property, is conclusive, on appeal to the supreme court, on the question of ownership, and also upon all the allegations in the complaint material to recovery in the action, if there is any evidence to sustain the verdict.

## 2. TRIAL—SPECIAL VERDICT—PROVINCE OF JURY.

It is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question which the court may deem proper to submit to the jury.

## 3. APPEAL—ERRORS AT TRIAL—INSTRUCTIONS—VERDICT.

When the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed on account of mere inaccuracies in some of the instructions given.

Appeal from Second judicial district, county of Alturas.

*Kimball & Haywood*, for defendants and appellants.

*G. L. Waters, L. Vineyard, J. B. Roseborough, and Brumback & Lamb*, for plaintiff and respondent.

BRODERICK, J. This case was here on appeal at the instance of defendants, and was decided at the January term, 1885. 7 Pac. Rep. 95. The former judgment was there reversed, and the cause remanded to the court below for a new trial. The plaintiff again obtained a verdict and judgment, and from this judgment the defendants appeal.

The facts, as disclosed by the record, are substantially as follows: On and prior to the twenty-first day of November, 1882, the firm of Adams & Cunningham were the owners of 71 head of mules and horses used in teaming, and at that time the firm was engaged in teaming for Collins & Co., the defendants herein, with this plaintiff as boss or train-master, in the employ of said Adams & Cunningham, on the Oregon Short Line Railroad. On November 21, 1882, at Pocatello station, on the line of said road, Adams & Cunningham, being threatened with attachment suits, sold their stock and forwarding outfit to Collins & Co., defendants, and delivered to them a bill of sale, but the property was not there, and no part of it was delivered until the next day thereafter. The defendants and Adams then proceeded to the 16-mile station on the road, where they met the plaintiff with some of the property, and informed him of the transaction. On the twenty-second day of November, 1882, at the 43-mile station on the road the firm of Adams & Cunningham, by bill of sale and by actual delivery, sold to the plaintiff the five mules described in the complaint. While the negotiation was going on between plaintiff and Adams for

the five mules, the defendant Stevens said to plaintiff that the sale of the property to defendants did not amount to much; that it was done to keep the work going on; and that he, (plaintiff,) could go ahead and purchase the mules, and thereby make himself secure. Immediately thereafter, and in presence of Stevens, the plaintiff selected the five head of mules, and he and Adams agreed upon the purchase price, and they were then and there delivered by Adams to the plaintiff. The delivery of the property was accomplished by a bill of sale executed by Adams & Cunningham. This occurred before the property had been delivered to the defendants. Adams then delivered to Stevens, for defendants, the other property, consisting of 66 head of stock and the forwarding outfit, and by agreement there made the plaintiff retained the control of the same for defendants, and continued in their employ as train-master. The plaintiff retained possession of the mules so purchased by him, and claimed and used them without objection from defendants until some time in January, 1883. On the nineteenth day of January, 1883, the defendants, while the plaintiff was absent, and without his consent, and by "force and arms," took and drove away the mules, claiming them under the bill of sale of November 21, 1882.

The action was brought to recover the property, and for damages, and the verdict was in favor of the plaintiff for the return of the property or \$1,000, the value thereof, and \$300 damages for wrongful detention of the same.

On the trial of the case, among others, the following special question was submitted to the jury: "(2) Was there a sale and delivery of the property in question for a valuable consideration by Adams & Cunningham to the plaintiff Lufkins? And if so, did the defendants assent or acquiesce in such sale and delivery?" This question was answered by the jury in the affirmative, and no other special verdict returned is in any manner inconsistent with this one. This special finding of the jury supports the general verdict, and is conclusive upon the question there submitted, if there is any evidence to sustain the finding.

At the trial defendants requested the court to instruct the jury to find specially on certain other questions, a part of which were submitted and others refused, and defendants excepted to the ruling upon the questions refused, and assign the same as error. By our Code, § 385, it is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has a right to dictate the terms of such questions, and for refusing to comply with such request no error can properly be assigned.

There are a number of assignments of error in the record as to giving certain instructions to the jury, as well as to the refusal of the court to give others, which assignments need not be noticed in detail.

We are unable to find any error, either in the instructions given or refused.

Counsel for defendants urge that the court erred in refusing to give the last instruction requested, which is as follows: "On the undisputed facts in this case defendants are entitled to a verdict of no cause of action." This request was made on the assumption that there was no evidence in support of the plaintiff's claim. We have carefully examined the record, and are satisfied that this assumption is not well founded. There is some evidence to support the verdict, but we deem it unnecessary to comment thereon at length. The circumstances surrounding the parties, the apparent motive that governed the parties when the transactions were had, the apparent acquiescence of the defendants in the sale to plaintiff, the manner in which the defendants obtained possession of the property,—in short, the whole case,—is such that we think it was properly submitted on the evidence and instructions to the jury to determine who had the better right and title to the property. *Monarch, G. & S. M. Co. v. McLaughlin*, 1 Idaho, 651; *Brown v. Brown*, 41 Cal. 88; *Trenor v. Central Pac. R. Co.*, 50 Cal. 222.

We are further satisfied, in view of all the facts and circumstances of this case, that justice has been done, and that the verdict and judgment should not be disturbed. The judgment is therefore affirmed.

HAYS, C. J., and BUCK, J., concurring.

(2 Idaho [Hasb.] 251)

PECOTTE, Assignee, etc., v. OLIVER.

Filed March 8, 1886.

1. ATTACHMENT—TO WHOM EXECUTION ON JUDGMENT SHOULD ISSUE.

The officer who has seized goods under a writ of attachment, and holds the same, is the proper officer to whom the execution on the judgment in the attachment suit should issue.

2. SAME—EXECUTION—DELIVERY TO WRONG PARTY—AMENDMENT.

Where a constable attached and held goods, and the execution was directed to the sheriff, but delivered to the constable, who served the same, *held*, the execution not void, but amendable.

3. SAME—ACTION FOR WRONGFUL SEIZURE—EXECUTION AS EVIDENCE.

Where constable was sued for value of goods seized, *held*, that the execution was proper evidence in his defense, and error in court to exclude the same.

Appeal from Second judicial district, Alturas county.

*F. E. Ensign*, for appellant.

*Kingsbury & McGowan*, for respondent.

HAYS, C. J. The appellant was an acting constable of Hailey precinct, Alturas county, and on the twentieth day of June, 1883, a warrant of attachment was duly placed in his hands for service in an action against one Charles E. Bolton. It was duly served by him seizing and holding certain property of Bolton's. Afterwards judgment was duly entered against said Bolton and an execution issued

thereon, and directed "to the sheriff of Alturas county." The execution was delivered to defendant, in virtue of which he sold the attached property. Soon after the attachment Bolton assigned his estate to this plaintiff, who brought his suit against this defendant for the value of the goods theretofore seized. Defendant sought to justify by showing the goods were seized by him as a constable under attachment proceedings against Bolton, and afterwards sold upon the execution issued upon the judgment obtained in the attachment suit. When the defendant offered the execution in evidence plaintiff objected because it was not directed to B. F. Oliver, or to any constable, but was directed to "the sheriff of Alturas county." The court sustained the objection, and defendant duly excepted. The court also refused to permit defendant to show anything done by him as constable under the writ; all of which was duly excepted to.

It is conceded that the defendant was the officer who had served the attachment process, and that he held the property by virtue of that writ. It therefore follows, as a matter of law, that he was the proper officer to whom the execution which sought to reach said attached property should issue, as he was the proper officer to make the sale. *Freem. Ex'ns*, 62; *Clark v. Sawyer*, 48 Cal. 133. Since all the property in dispute was that held under the attachment, the direction of the execution must therefore be treated as a direction to an improper officer, as it clearly was, so far as the subject-matter of this action is concerned. The rule is laid down by Freeman on Executions, § 65: "Where a writ is directed to an improper officer, but executed by the proper officer, the error in the direction does not vitiate the writ, and may be cured by amendment." This position is abundantly sustained by the authorities. *Waple*, *Attachm.* 141; *Hearsey v. Bradbury*, 9 Mass. 95; *Campbell v. Stiles*, *Id.* 217; *Lyon v. Fish*, 20 Ohio, 105; *National Bank v. Franklin*, 20 Kan. 264; *Walden v. Davison*, 15 Wend. 575; *Hibberd v. Smith*, 50 Cal. 519. It follows that the execution was not void, and the irregularity might have been cured.

Doubtless the better practice in such cases is to apply to the court from which the writ issues to amend the same. Such court would have the right, and it would be its duty, to correct the same; in this case by directing it to the officer to whom it was doubtless intended to be given for service. But as this execution was amendable, and not void, we think the court erred in sustaining the plaintiff's objection. For the same reason we think the court erred in refusing to permit defendant to show delivery of execution to him. For these reasons we think the judgment should be reversed, and a new trial ordered.

Judgment reversed and cause remanded for further proceeding in accordance with this opinion.

BUCK, J., concurring; BRODERICK, J., expresses no opinion.

(2 Idaho [Hasb.] 254)

**MOTHERWELL and others v. TAYLOR.**

Filed March 8, 1886.

**TRUST—RESULTING TRUST, WHEN RAISED.**

A resulting trust is raised only when there is fraud in the acquisition of title, or where the money of one is used to pay for real property the title to which is taken in the name of another at the time said title is taken, and neither a promise to pay nor after payment will give rise to such trust.

Appeal from Second judicial district, county of Alturas.

The facts appear in the opinion.

*L. Vineyard* and *J. B. Roseborough*, for appellants.

*F. E. Ensign* and *George H. Roberts*, for respondent.

HAYS, C. J. This action was brought to declare a partnership and a resulting trust in favor of the plaintiffs in certain mining property. The theory of the plaintiffs was that a mining partnership was entered into between plaintiffs and defendant, Frank Taylor, about the first day of August, 1882; and it is alleged by plaintiffs that at the same time defendant agreed to negotiate for, and if possible buy in, for the partnership, of one Joseph Taylor, a conflicting claim called the "Far West," in the Davitt mine; that on or about the eighteenth day of August, 1882, the defendant purchased said claim, together with an interest in the "Snow Fly" claim, then a prospect, for \$600; that the said sum of \$600 was by defendant loaned or advanced to the partnership, and security taken therefor upon the ores upon the dump and in sight in the Davitt mine; that afterwards the \$600 so paid for the interest in the claim was repaid to Frank Taylor from the proceeds of the Davitt mine; that defendant, Frank Taylor, had fraudulently concealed from the plaintiffs the fact that he (defendant) had purchased an interest in the Snow Fly, and that plaintiffs did not ascertain the fact for more than a year after the transaction. The plaintiffs claim that by reason of these facts there was a resulting trust in their favor in and to the Snow Fly mining property.

The case was tried by the court, and the findings were, in substance, that there was no partnership entered into until after the purchase of the claim from Joseph Taylor; that the defendant, Frank Taylor, paid for the entire property purchased of Joseph Taylor from his (defendant's) own funds; that defendant did not take any security from plaintiffs for the money so paid for the claim; that the \$600 was, after the purchase, repaid from the proceeds of the Davitt mine; that there was no fraudulent concealment of facts on the part of the defendant, Frank Taylor; that all the agreement between the plaintiffs and defendant as to the partnership was made contingent upon the purchase of the conflicting claim; and that as it was not partnership funds that purchased the claims, there was no resulting trust in favor of the plaintiffs in the Snow Fly mining property. On the findings and conclusions of law judgment was rendered against the

plaintiffs. Motion for new trial was overruled, and from the judgment and order overruling the motion for a new trial the plaintiffs appeal to this court.

The question is, was the money used by the defendant, Taylor, in the purchase of the two claims, partnership funds? If it was not, then there is no resulting trust. As we understand the law applicable to this case, it was the payment of the purchase money at the time the title was obtained that would raise a trust of this kind, and neither a promise to pay nor after payment is sufficient. Here the defendant paid his own money, and we cannot see that he took any security therefor. Certainly there was nothing said or done which would have made the plaintiffs personally liable to the defendant, Taylor, for the money; nor was there any note or other security in writing taken, nor property pledged and delivered to defendant. We conclude from the record that defendant purchased the claims with the view of getting his money back from the proceeds of the mine, if he could do so, and that there was no partnership at the time of the purchase. *Ryan v. Dunphy*, 1 Pac. Rep. 711; *Snyder v. Wolford*, 22 N. W. Rep. 254.

We have examined the record and see no error. Judgment of the court below is therefore affirmed.

BUCK and BRODERICK, JJ., concurring.

v.10p.no.4—20

## SUPREME COURT OF OREGON.

(13 Or. 235)

STATE v. MAH JIM.

Filed March 9, 1886.

## 1. CRIMINAL LAW—MOTIVES OF WITNESSES—USE OF THE COURTS TO SUBSERVE PRIVATE ANIMOSITIES.

The law will not tolerate a use of its forms to enable parties to accomplish selfish ends, and whenever there is a lurking suspicion, even, that such might be the object, their purpose should be closely scrutinized.

## 2. SAME—NEW TRIAL—SUCH TO BE AVOIDED—MEANS OF AVOIDING NECESSITY FOR—EVIDENCE ON TRIAL—LIABILITY TO PRISONER.

The granting of a new trial in a criminal case creates an additional expense upon the county where it is had, and so should be obviated as far as possible. To this end testimony that has any possible bearing upon defendant's case in a criminal trial should not be excluded.

## 3. WITNESS—CROSS-EXAMINATION—LIBERALITY OF LAW TO DEFENDANT IN CRIMINAL CASE.

Great latitude should be allowed a party, in a criminal case, in conducting a cross-examination.

*J. H. Woodward*, for appellant.

*John M. Gearin*, for the State.

BY THE COURT. We are of the opinion in this case that the circuit court should have permitted the appellant's counsel to ask the witness Chin Wah the question "as to whether he had ever had a meeting since the killing of See Toy occurred,—a meeting of the Masonic lodge,—in which he had discussed and laid plans for the conviction of Mah Jim, and if each of the men therein named, witnesses for the state, were present at that meeting, and whether he did not participate in that discussion and in that action that night," and the following question: "Have you since the murder of that man, See Toy, participated in a meeting of the Masonic lodge, in which his murder was discussed, and at which time you laid the plans and discussed the means by which you could secure his [Mah Jim's] conviction? And did you not, at the same meeting, threaten with vengeance any man who was a member of that body who would assist in any way, either directly or indirectly, the defendant to establish his innocence?" Also the question "as to whether the notice on the bulletin-board that was torn down was not signed by the Masonic order, with its seal and stamp." The testimony sought by the two former questions would have had a direct tendency to show a feeling upon the part of the witness, and upon cross-examination great latitude should be allowed a party in a capital case. The testimony sought by the latter question would have had a tendency to show that said notice was published by authority of the lodge of which the witness was a member, and have entitled the appellant to prove its contents, it having been lost. Experience convinces every one that the testimony of

Chinese witnesses is very unreliable, and that they are apt to be actuated by motives that are not honest. The life of a human being should not be forfeited on that character of evidence without a full opportunity to sift it thoroughly. The law will not tolerate a use of its forms to enable parties to accomplish selfish ends, and whenever there is a lurking suspicion, even, that such might be the object their purpose should be closely scrutinized. The witnesses referred to may have been attempting to carry out a diabolical design,—no one can tell what that class of persons may have in view. Their practices are very peculiar and mysterious, and the court, in no such case, should adopt a refined, technical rule as to the admission of evidence tending to show what their motives may be. To allow a conviction in so important an affair might result in the sacrifice of the life of an innocent person, which would be a damaging defamation upon judicial proceedings. It is not at all certain that the witness would have given a favorable answer to the appellant's question propounded to him, but the court cannot know that; it can only consider whether the evidence elicited would have been competent or not, and there is now no question in the mind of this court but that it would have been. If the two former questions had been answered in the affirmative, the testimony of the witness in chief would have been very materially discredited.

It was claimed by the respondent's counsel, upon the argument, that the substance of the question was asked the witness under another form, that was unobjectionable; but that cannot be conceded, nor would it be likely to have obviated the effect of the error if such had been the case. The appellant's counsel should have been allowed to pursue his own course in attempting to draw out proof, as long as he kept within reasonable bounds. It must clearly appear that an error is harmless in such a case to prevent a reversal of the judgment.

The appellant's counsel claimed that it was error in the court's making the remark it did upon overruling the motion to postpone the cause until the following morning; but as that is not likely to occur again, we have not deemed it necessary to comment upon the point.

We deem it our duty to send the case back for a new trial upon the points referred to. The other errors assigned were not well taken.

The granting of a new trial in a criminal case creates an additional expense upon the county where it is had, and the occasion for it should be obviated as much as possible. We have heretofore suggested one means of avoiding the necessity of having to grant new trials in such cases. It is by pursuing a liberal course in the admission of testimony in the trial court. Testimony that has any possible bearing upon the defendant's case should not be excluded. Such a course would save time in the trial of a cause, and prevent the apprehension upon the part of the defendant that he had not

had a fair and impartial hearing. Nor would it, in our opinion, be any more liable to allow guilty parties to escape punishment.

The judgment appealed from is reversed, and the case remanded for a new trial.

(13 Or. 248)

**DOWELL v. CITY OF PORTLAND and others.**

Filed March 15, 1886.

**1. MUNICIPAL CORPORATIONS—CITY OF PORTLAND—DOCKET OF CITY LIENS.**

The charter of the city of Portland provides that the docket of city liens shall contain the name of the owner of the property assessed, or shall state that the owner is unknown.

**2. SAME—DOCKETING OF PROPERTY UNDER WRONG NAME—EFFECT OF TAX SALE.**

If the name of a stranger is entered on the docket, and the property thereafter sold in default of payment of taxes, such sale is void so far as the true owner is concerned.

**3. SAME—REASSESSMENT AFTER TAX SALE.**

A reassessment ordered, after sale of the property in a tax sale, is beyond the scope of the powers of the city of Portland under its charter.

THAYER, J., dissenting.

Appeal from Multnomah county.

*Geo. W. Yocum and B. F. Dowell*, for appellant.

*R. Williams*, for respondents.

WALDO, C. J. The charter of the city of Portland provides that the assessment roll of taxes for a street improvement, called in the charter the "Docket of City Liens," shall contain the name of the owner of the property assessed, or shall state that the owner is unknown. The lots were assessed to a stranger to the title. This case arises on an attempt to reassess to the true owner after a sale on the first assignment and payment of the purchase price.

"Tax titles were unknown to the common laws of England. The only way in which an Englishman's lands could be involuntarily aliened, except in case of forfeiture for treason, was by judgment of law; or, as it is expressed in the great charter, 'law of the land.'" 9 Amer. Law Rev. 566. An American may be deprived of his lands without the judgment of his peers, and even without notice; but it is to the credit of the common law that no sanction for such proceedings is found in its bosom, and that its wise rule of statutory construction, that statutes in derogation of its principles are to be strictly construed, has not tended to facilitate the divestiture of property by such proceedings,—proceedings which are not only alien in principle, but even in the language in which they are expressed. When counsel say, "This is a proceeding *in rem*," we expect some argument better suited, as the author of the commentaries in another connection has said, for a despotic monarchy than the free constitutions of an English people. In this case, the name of a stranger having been entered on the docket, the sale was void as to the plaintiff. *Smith v. Cofran*, 34 Cal. 316; *Hubbell v. Weldon*, Hill & D. Sup. 142; *Bush v. Will-*

iams, Cooke, 274; *Abbott v. Lindembower*, 42 Mo. 162; *Dunn v. Winston*, 31 Miss. 137; *Clarke v. Strickland*, 2 Curt. 444; *Corporation of Washington v. Pratt*, 8 Wheat. 681.

A power has been stated to be the dominion which one person exercises over the property of another. *Maundrell v. Maundrell*, 10 Ves. Jr. 265. The city exercised a naked statutory power. It was not adjudicating anything, and therefore not exercising jurisdiction over anything, in any juridical sense; or, if so, then every grantee of a power is exercising jurisdiction when he executes the power. When the reassessment was ordered, the property had been sold and the assessment paid into the city treasury. The power to sell had been executed and exhausted. There was no authority to refund and reassess. This proceeding, therefore, is void. *Hamilton v. Valiant*, 30 Md. 139; *Lyon Co. v. Goddard*, 22 Kan. 398; *Harper v. Rowe*, 53 Cal. 234; *Curry v. Hinman*, 11 Ill. 420; *Homestead Co. v. Valley R. Co.*, 17 Wall. 153; *Peebles v. Pittsburgh*, 101 Pa. St. 304; *St. Paul v. Mullen*, 27 Minn. 78; S. C. 6 N. W. Rep. 424; *Allen v. Smith*, 1 Leigh, 231-250; *Irvine v. Elnon*, 8 East, 54; *Smith v. Bowes*, 38 Md. 466; Blackw. Tax Titles, 356.

The decree below must be reversed, and the court below directed to make the injunction perpetual.

LORD, J., (*concurring*.) The regularity of the proceedings prior to the entry upon the lien docket of the assessment is not questioned. The defect was in recording the assessment in the name of B. F. Dowell instead of Fannie Dowell, who is the owner. Under the charter, when the assessment is recorded as required, it becomes from that time a lien upon the property. It is admitted that all the subsequent proceedings for the sale of the lots were vitiated by this defect, and of no legal force or effect. But it is contended that the city has the power, after the sale and the payment of the purchase money to it, to refund the money to the purchaser, and to reassess the property by making a correct entry thereof, conformable to the facts, by which the lien shall be created and a valid assessment made. It is conceded that there is no legislative sanction or authority in the charter to do this; but it is claimed that the right results from the fact that the power to create the lien by making a correct entry has never been exercised, and therefore the city may disregard the previous void proceedings for the sale of the lots, return the money to the purchaser, and cause the original assessment to be properly recorded, and the lots again sold. If this can be done at this stage of the proceedings, in the absence of any legislative direction or authority, it must be because the making of such erroneous entry was simply a formal defect, or, to say the least, a mere irregularity which may be waived or corrected. It certainly cannot be done if the making of a correct entry is essential to create the lien, or the making of a defective one is fatal to it, and vitiates all subsequent proceedings which the argument admits; for it is an elementary principle in proceedings of this

character, the power conferred being purely statutory, that every essential requirement leading to the ultimate act must be in strict conformity with the statute. A step or matter so indispensable that without its proper performance no valid assessment can be made, or lien created, cannot be regarded as a mere directory requirement, or irregularity, which may be dispensed with or corrected without some positive legislative authority. But to avoid this embarrassment, it is said that the power of the city or its auditor to create the lien has never been exercised, and that, therefore, the city is not deprived of its power in the premises. Even if this argument was available, (which is not admitted or decided,) it cannot be applied to the facts here. It overlooks the distinction between the failure to exercise a power and the defective exercise of the power. The case here is not the failure of the auditor to exercise his power, and make an entry in the lien docket, but in the exercise of the power he has made an incorrect and defective entry, which has failed to create the lien, and vitiated all the subsequent proceedings. It was rather a defective execution of the power than a failure to exercise the power. If the sale had been made without the semblance of an entry upon the lien docket whatever, it might then be said the power conferred was never exercised for the creation of a lien.

The true inquiry, then, is whether the auditor had the power to make a second entry for the purpose of correcting the error of the first, upon which the void sale was made, or, having once made his entry, was his power in this respect entirely exhausted, or at an end, and did the one now made, or could it, create a lien? By the charter, after the doing of certain things therein prescribed, and the amount of the liability to be charged against the property benefited is ascertained, the charter requires the auditor to make an entry of the same in the lien docket, in the manner therein prescribed, and thereafter such liability or amount becomes a lien against the property. It thus appears that the power of the auditor to make the entry by which the lien is created is derived solely from the statute or charter, and not otherwise. Without such power conferred his entry would create no lien or charge against the property. There is no suggestion, in express words, or by implication, in the charter, that he can make any other or more entries than the one prescribed. But if the auditor, upon his own motion, or under direction of the council, may ignore the first entry, and make a second, then what is the limit, and how often may he make such entries or exercise such power to make good his mistakes or errors? The fact that the statute gives him no such power, and the rule of strict construction universally recognized and applied by the courts in this class of proceedings, ought to be sufficient to settle this question without recourse to judicial precedent. The fact, too, that his authority is delegated by law, and his duties in the premises are purely ministerial, and involve the exercise of no judicial function, would exclude his power

of amendment, upon common-law principles, without the aid of some statute. In stating the general principle applicable to such officers, Mr. Blackwell says:

"The acts of ministerial officers are to be tested by the law which authorized them. When the act is completed, their power is *functus officio*; and if in the record, return, or other evidence of their acts they have failed to conform to the requisitions of the law of the land, or to state the facts as they actually transpired, the error cannot be obviated by amendment, because their power over the subject is exhausted. By the record, as originally made, their acts must stand or fall." Blackw. Tax Titles, 357.

Nor must it be overlooked that the matter here is not *in fieri*. The auditor had exercised his power,—had made his entry,—and under color of that act as thus performed and done the subsequent proceedings were had, the property sold, the deed executed to the purchaser, and the money in payment thereof passed into the treasury of the city. It is true the purchaser got no title because of the defect, but the city, nevertheless, got its tax, although upon a void assessment. Can the city now, upon this state of facts, refund the money to the purchaser, in order to enable it to reassess the property in the name of the appellant, and thus create a lien against it for the purpose of again subjecting it to sale, in case of delinquency? This question has already been answered, but let us examine the matter in another light. How do the parties stand? The city has got the amount of the assessment in its treasury as the purchase price of the land sold under the void assessment. The purchaser, it is admitted, got nothing; but that is his fault or neglect, and not the appellant's, for to him the doctrine of *caveat emptor* applies. He had full notice of the defect in the assessment or proceedings, or could have obtained it. He is a mere volunteer, and cannot recover back what he voluntarily paid out. "The general rule is beyond dispute that the purchaser at a tax sale assumes all risk, and, except as he may be vested by force of statutory provisions with the lien which the state or municipality held against the property of the delinquent tax debtor, he is without remedy if he fails to obtain a good title under his purchase. The doctrine of *caveat emptor* applies to such sales in its fullest force." Wood, C. J., in *City of Logansport v. Humphrey*, 84 Ind. 469; Cooley, Tax'n, 572; *Lynde v. Inhabitants of Melrose*, 10 Allen, 49; *Packard v. New Limerick*, 34 Me. 266; *Hamilton v. Valiant*, 30 Md. 139. The city does not warrant such titles, nor can it bind itself by an agreement to warrant the title of a purchaser at such sale, unless such power is conferred by the charter or statute. *City of Logansport v. Humphrey*, *supra*. If a municipality cannot warrant tax titles to purchasers without legislative authority, how can it return the money to such purchasers without like authority, when his payment has been voluntary? The money is now in the treasury, and is the property of the city. Unless there is statutory power to return it, the money must remain in the treasury, and what liability exists

out of which, by a corrected entry on the lien docket, a lien can be created against the property of the appellant? To do either there is a want of statute authority, and without this the authorities cited by the chief justice abundantly show it cannot be done. Indeed, it may be laid down as a general principle of universal application to this class of cases that it is only where there is proper legislative authority, a municipality may make a valid reassessment of property for local improvements, in view of an assessment which is insufficient, irregular, or defective. *Howell v. Buffalo*, 37 N. Y. 267; *In re. Bank of Antwerp*, 56 N. Y. 261; *Brown v. Mayor of N. Y.*, 63 N. Y. 239; *Emporia v. Bates*, 16 Kan. 495; *State v. Newark*, 34 N. J. Law, 236; *Edwards v. Jersey City*, 40 N. J. Law, 176; *Whittaker v. Janesville*, 33 Wis. 76; *Brevcoort v. Detroit*, 24 Mich. 322; *Mills v. Charleton*, 29 Wis. 400; *Hubbard v. Garfield*, 102 Mass. 72; *Tweed v. Metcalf*, 4 Mich. 590; *Chicago v. Ward*, 36 Ill. 9; *Meuser v. Risdon*, 36 Cal. 239; *Schenley v. Com.*, 36 Pa. St. 29. I feel constrained, therefore, upon the state of facts presented by this record, to concur in the opinion of the chief justice.

THAYER, J., (*dissenting*.) This appeal is from a decree rendered by the circuit court for the county of Multnomah, in favor of the respondents and against the appellant, in a suit brought by the latter against the former to enjoin the sale of lots 6 and 7, in block 182, Couch's addition to the city of Portland, to recover certain sums of money respectively assessed upon said lots for the improvement of North Fifteenth street, in said city, under its authority to improve streets. The appellant alleged, in substance, ownership in herself in fee-simple of said lots by purchase from the heirs of John H. Couch prior to the year 1879, and that in August, 1880, by order of the common council of said city, the improvement of said North Fifteenth street was directed to be made in front of and adjoining said lots, and they were assessed on account of the improvement, in the name of B. F. Dowell, \$181.16, about \$90 each; and that on or about the twenty-fourth day of said month said assessments were, by order and direction of the common council, entered in the docket of city liens by the auditor of said city, and against B. F. Dowell, as the owner thereof; that on the fifth day of January, 1881, a warrant was issued by order of said common council to the then chief of police of said city, J. H. Lappeus, for the enforcement of said tax, who, by virtue thereof, levied upon said lots as the property of said B. F. Dowell, and, on the seventh day of February, 1881, sold them at public auction as the property of B. F. Dowell, to the highest bidder for cash in hand; and that the respondent Monastes was the highest bidder at such sale, and became the purchaser of said lots, and other lots included in said warrant not involved in this case, for the price and sum of \$354.76; that said Monastes, on said seventh day of February, 1881, as purchaser at said bid, paid over to the said chief of police said sum of

assessments, including costs and expenses, aggregating the sum of \$387.40, and that the latter thereupon executed to him a deed of conveyance, in due form of law, for said lots.

The appellant, in her said complaint, further alleged that Monastes, at said sale, purchased all the right of B. F. Dowell to said lots, and paid for it to the chief of police said sum, and received and accepted the deed; and that said money was applied in full satisfaction of said assessment; and that all prior taxes and assessments and liens created, or attempted to be created, upon the lots listed or assessed in the name of B. F. Dowell or the appellant were fully satisfied; that B. F. Dowell, in 1872, after the deeds from the Couch heirs were recorded, took actual possession of said lots, cleared off the timber, fenced them, and built a dwelling-house thereon, and leased the same, and collected and appropriated the rents to his own use, without any authority from the appellant until after said sale to Monastes; thereupon he gave the possession thereof to the appellant, and that she has had the actual possession ever since, collected the rents, and converted them to her own use, and that B. F. Dowell never claimed any title in said land except the legal title of possession, and he quitclaimed the possession in about five days after said purchase by Monastes; that on or about the sixth day of February, 1884, at the instance of Monastes, the said common council fraudulently pretended, and did formally pass an ordinance, (No. 4,142,)—as a charge and relief bill for Monastes,—declaring in said ordinance, which was approved by the mayor of said city on the seventh day of February, 1884, that the former entries of said assessment made in the docket of city liens against said lots, and B. F. Dowell as the owner thereof, were mistakes and errors; that said ordinance further directs the auditor of said city to enter a statement of the said assessment of said lots, with the costs of enforcing the same in the docket of city liens; and thereafter, on or about the fifteenth day of April, 1884, the auditor of said city, in obedience to said ordinance, proceeded to enter a statement of the assessment of said lots, and the costs of entering the same in the docket of city liens; that the deed from Lappeus to Monastes only conveyed B. F. Dowell's tenancy at will to the latter, and said ordinance is fraudulent and void against the title of appellant; that all prior taxes and assessments on said lots in the name of B. F. Dowell and appellant, or either of them, in favor of the city of Portland, were paid and satisfied prior to the passage of said ordinance No. 4,142, and the city of Portland and Monastes well knew the same prior to the time of the passage of said ordinance, and that it was made for the use and benefit of said Monastes, without any consideration whatever, and with intent to cheat and defraud the appellant out of said sum assessed upon said lots; that the city of Portland and Monastes had constructive notice prior to and at the time said lots were assessed to B. F. Dowell, and at the time of the assessment and sale, and the making and recording of said deed, that appellant

was the owner of said lots in fee-simple; that prior to the assessment to B. F. Dowell, Monastes had actual notice that appellant was the owner in fee-simple prior to and at the time said deed to him was recorded in said clerk's office, and notice that B. F. Dowell had no title to said lots, except the possession, and that he was not then nor ever had been the owner of said lots of land in fee-simple, or any part thereof; that after Monastes knew the appellant was in actual possession of and owner of said lots in fee he caused said deed from Lappeus to be recorded, and he claimed said lots and caused said ordinance 4,142 to be passed, and that said claim and ordinance depreciate the value of the lots, and injure the possession and enjoyment of them; that on or about the fifteenth day of September, 1884, in pursuance of the order and direction of the common council, the auditor issued a warrant to enforce the collection of \$181.16, and costs and expenses assessed against said lots, and against the appellant as the owner thereof; that afterwards, on the seventeenth day of September, 1884, said last-mentioned warrant was delivered to the respondent S. B. Parrish, chief of police of said city; that said warrant commands the said chief of police to proceed forthwith to levy upon said lots, and sell the same in the manner provided by law, to make said assessment, costs, and expenses, and to return the proceeds of such sale to the city treasurer; and that, in obedience thereto, the chief of police, said Parrish, has pretended to and has formally levied said warrant upon said lots for sale, at public auction, to satisfy said assessment; that said Parrish, if not restrained, will sell the same, which will cast a cloud upon the title; that said common council had no power to pass said ordinance No. 4,142, or to order or direct said auditor to enter a statement of said assessments upon the docket of city liens, or to direct said auditor to issue said warrant to enforce the collection of said tax; that said Lappeus had no power or authority to sell or convey said lots to Monastes in fee-simple, or any title but the possessory title of B. F. Dowell; that said assessment levies made by virtue thereof, and deed of conveyance made to Monastes, are apparently regular on their face, conform to the forms of law, and apparently give Monastes a title to an extent calculated to deceive, mislead, embarrass, and clog appellant's title in fee-simple. The complaint contains a prayer the substance of which is that the respondents be enjoined from further proceedings to enforce said assessments, and from selling said lots 6 and 7, and to declare the said deed from Chief of Police Lappeus to Monastes only a conveyance to the latter of the possession of B. F. Dowell of said lots between the time of the sale thereof by said Lappeus to Monastes and the time he, said B. F. Dowell, gave the possession to the appellant, alleged in the complaint to have continued five days.

The respondents interposed a demurrer to the complaint upon the grounds that the facts alleged did not constitute a cause of suit. The circuit court sustained the demurrer, and, the appellant having

failed to amend, entered a decree dismissing the complaint, which is the decree appealed from.

The appellant's suit proceeded upon the theory that the assessment upon which the lots were sold by the chief of police, Lappeus, was a personal tax, and that consequently it was only a charge upon the interest which the party named as owner in the docket of city liens had in the property. I have examined that question in another case before this court, and concluded that an assessment for street improvements upon the adjoining property was in the nature of a proceeding *in rem*; that the charter pointed out the various steps to be taken in order to make the assessment, and that it must be strictly complied with, else the assessment, and all proceedings had thereon, will be void. The tax is against the lots charged with the expense of the improvement. The charter requires that a statement be entered in the docket of city liens, containing, among other things, the name of the owner of the lot assessed, or that the owner is unknown; and it provides also that, to ascertain the owner, the city auditor shall take the certificate of the county clerk, stating who the owner is at the date of the ordinance making the assessment. Sections 86, 87, c. 8, Charter in force in 1879. In order, therefore, to make a valid assessment, the name of the real owner must have been entered in said docket, or an entry that the owner was unknown, or the name of a person certified by the county clerk to be the owner. Either would have answered the requirements of the charter in that particular. When the name of a person is inserted in the docket as the owner of the lot who is not such owner, unless it is stated in such certificate that he is the owner the proceeding will be a nullity, for the reason that the provisions of the charter have not been observed; but where they are fully complied with, all the estate or interest therein of the owner, whether known or unknown, is conveyed, subject to redemption, to the purchaser. Section 114, c. 10, City Charter.

The nature of the proceeding, and the intention of the legislature as expressed in the charter, clearly indicate that the assessment and sale of the lot, in such a case, are designed to transfer the absolute proprietorship of it, in case no redemption is had. From the date of the entry of the assessment upon a lot, or part thereof, the sum so entered is to be deemed a tax levied and a lien thereon, which lien has priority over all other liens or incumbrances thereon whatever. Section 103, c. 10, Charter. It becomes, by force of the charter, when its provisions have been strictly observed, a *jus in re*, and the sale of the lot to enforce the payment of the assessment must operate to transfer the ownership, or else be wholly inoperative. The principle decided in *Corporation of the City of Washington v. Pratt*, 8 Wheat. 682, is decisive of this point. The sale, therefore, by Chief of Police Lappeus to Monastes of the lots in question either conveyed an absolute title, there having been no redemption, to the latter, or it was a nullity. If the auditor had applied to the county clerk of the county of

Multnomah for a certificate as to the ownership of the lots, and the latter had furnished it, showing that B. F. Dowell was such owner, the lien would have been perfected, as it is doubtless in the power of the legislature to provide such mode for ascertaining ownership. In the case of *Corporation of the City of Washington v. Pratt, supra*, the court says, after concluding that the assessment there should have been made to the real owner, that, "had congress intended to lighten the labors of the corporation, or their assessor, in this respect, there was a very simple means of doing it. They might have sanctioned a designation with reference to the first or last vendee of record. Page 685.

But we cannot presume, as urged by one of the appellant's counsel upon the argument we should, that that was done; though I am convinced that, as the auditor failed to enter in said docket the name of the rightful owner, the assessment was incomplete and ineffectual for any purpose, and the tax failed to become a lien upon the lots; and that the attempt of the city officers to sell them under the proceedings specified above was a void act. But I am satisfied that the power of the city was not exhausted in consequence of such failure. In *Himmelman v. Cofran*, 36 Cal. 413, in a similar case, Judge Sawyer uses this language:

"In this case the statute makes it the duty of the superintendent, after the fulfillment of the contract to his satisfaction, to make an assessment to cover the sum due for the work performed in accordance with the provisions of the act, and afterwards to issue a warrant thereon. No time is limited in which the assessment must be made. Time is therefore not of the essence of the power. In this case, under the decision in the case cited, (*Dougherty v. Hitchcock*, 35 Cal. 512,) he has never made an assessment in pursuance of the provisions of the act. His act was utterly void, and of no more legal force than so much blank paper. His act, in legal contemplation, was no act. The warrant issued, based upon his blank and void assessment, and all subsequent proceedings, were void. They created no lien or charge upon the land, in no way affected the rights of the parties. The superintendent has not performed the duty enjoined upon him by the act, and we know of nothing that stands in the way of his performing it now."

The right to exercise the power to assess the property in the above case, under the circumstances surrounding the affair, was much more questionable than that of perfecting the lien in the case under consideration. Here the assessment was complete, so far as it went. Notice had been given of the contemplated improvement of the street. No remonstrance by two-thirds of the owners of the property adjacent thereto had been signed or filed. The council had proceeded to ascertain and determine the probable cost of making the improvement, and had assessed each lot and part thereof liable therefor its proportionate share of such cost, and the same was declared by ordinance. All that remained was for the auditor to enter the statement referred to, and the cost would then become a lien upon the lots. It stood like the recovery of a judgment in a court of justice before docketing it. The lots were a fund out of which to pay the expenses of the improve-

ment, but the auditor, in entering the said statement, inserted the wrong name as owner of the lots in question. The council had directed him to file a statement as required by the charter, and he failed to do it. Now, how can it be claimed, in reason and justice, that the council cannot again direct him to do his duty? He had not carried out the direction of the council, and it was certainly the duty of that body to require him to perform it. Can it be maintained that the council, where it has directed a ministerial officer to perform a ministerial duty, and the officer has not done it, is *functus officio* in regard to the matter? That would certainly be the height of absurdity. If the charter should have required, in order to complete the lien, the recording of a copy of such entry in the county clerk's office, and the council had directed the auditor to have the same so recorded, but in attempting to comply therewith he had taken it to the wrong clerk's office; or, in making a copy, had made a mistake,—would any one pretend that it could not be corrected without a proceeding *de novo*? What wrong could accrue to the lot-owner in consequence of such a correction? Must he be permitted to shirk his share of a common burden because of the neglect to observe some nicety that does not affect his rights in the least? Is the law made up of mere refinements and quibbles?

In this case the city gave notice of a proposal to improve North Fifteenth street. The owners of the lots adjacent thereto could have defeated it by a remonstrance. The city had no way of raising a fund to defray the expenses except to charge it upon such lots. The lot-owners, by neglecting to file a remonstrance, tacitly assented to the improvement, knowing that the costs must be charged upon the lots. The costs were so charged, the contract let, and the improvement completed. The burden is apportioned. The lots have received the full benefit. All the lot-owners are supposed to have paid their share except the appellant, who insists that she should not be compelled to pay her proportion because the auditor, in entering the assessment in the city lien docket, after the council had ascertained and determined the proportionate share of the cost to be assessed to the lots and declared the same by ordinance, had inserted her father's name instead of hers in the docket as owner. And when the mistake has subsequently been discovered, and the auditor is directed to do what he at first should have done in order to enforce an obligation that equality and the law demand, she comes into a court of equity to have it exercise its restraining power to shield her from being compelled to do that which natural justice dictates she ought to do. I must confess that I am unable to discover any grounds for equitable interference in such a case even though the city council had no power to cause the said entry to be properly made. I do not believe that it is within the province of equitable cognizance to shield a party against the enforcement of a just claim in any case, nor that there is any stronger moral obligation than that which requires a party who has been the recip-

ient of a common benefit to contribute to the burden which it imposes.

But it is due the credit of the appellant's counsel that they did not base the appellant's claim for relief upon the technical irregularity referred to. They placed it upon fair legal grounds; contended that B. F. Dowell had some kind of an estate in the lots, and that the sale under the proceeding to Monastes divested Mr. Dowell's interest, and that Monastes acquired it under the purchase. If their position had been correct,—if the mere right of the person named in the entry made in the city lien docket as owner was affected,—there would have been much force in the position. A part of the relief demanded in the complaint was that the deed from Lappeus, chief of police, to Monastes be declared only a conveyance to the latter of the possession of Mr. Dowell to said lots during the five days before mentioned. Said counsel did not question the regularity of said sale. They claimed that it was regular, and conveyed an actual subsisting interest in the property, though a very slight one, to Monastes. If the sale had had such effect, the argument would have been conclusive; but it did not. It did not convey anything,—not even Dowell's said five days' possession. Such a proceeding is not against an owner or occupant of the property,—it is against the property itself. The city charter requires that the statement entered in the docket of city liens shall contain the name of the owner, or that the owner is unknown. This provision was not complied with. B. F. Dowell in nowise was the owner of the lots in the sense intended by the charter, and for that reason the sale to Monastes was wholly inoperative, not because the previous proceedings were irregular, for they were not,—they were regular and valid up to that time,—but the issuance of the warrant for the sale of the lots to satisfy the demand was irregular, in consequence of the entry in the lien docket of a wrong statement as to the ownership.

The matter was not, however, in the condition of the case of *The Fideliter v. U. S.*, 1 Sawy. 153, nor of that of *Pennoyer v. Neff*, 95 U. S. 714. In those cases the whole proceedings were void *ab initio*. In the former one it was held that an actual seizure must be made of a vessel before any judicial proceedings are instituted to condemn it for a violation of the navigation laws of the United States, and in the latter that a substituted service of process was not sufficient to confer jurisdiction where the property was not brought under control of the court by seizure under an attachment. It was more like a case, as before suggested, of a judgment recovered but not docketed. A sale of the property before the lien of the assessment attached conveyed no interest in it whatever, and the lien did not attach until there was the entry of the statement in the city lien docket containing the name of the true owner of the property affected, or that the owner was unknown. A sale made before the cost of the improvement was apportioned would have been as effectual to pass title as this one. The issuance of the warrant, and all proceedings had

thereon, were, as said by Judge SAWYER, "utterly void, and of no more legal force than so much blank paper,"—were, "in legal contemplation, no acts."

But the prior proceedings were not affected. The improvement of the street had properly been ordered, the cost legally ascertained and determined, the apportionment duly made upon the lots chargeable therewith, and the work completed. The power, however, to enforce payment had been interrupted by the failure to enter a true statement as to the ownership of the property as mentioned, and the council was compelled to go back to the point in the proceedings where the fault occurred and begin over. Had it occurred in the outset, in some preliminary step authorizing the proceeding to improve the street,—such as giving notice of the proposed improvement,—the whole affair would have been upset. There would have been no foundation to support it. But jurisdiction had attached, the proceedings were regular and valid up to the time of entering the statement, and a failure to enter a statement at all, or an improper one, which would be no statement, could not have invalidated the previous proceedings. All the council had to do was to go back to the point where the break occurred, and require that done which ought to have been done when the first attempt was made. There are cases, as said *Himmelmann v. Cofran, supra*, in which a defective execution of a power exhausts the power, but, as there said, "it is when the nature of things is such that it cannot be but once exercised," or, in other words, be but one attempt to exercise it. The case of the assessment of property by a county assessor for the purposes of taxation is an example. The assessor is required to perform his duties within a certain period, and turn over the assessment made to the county court. After so doing he would not, of course, have any right to correct his work; but there is no such limitation upon the power of the common council of the city of Portland. That is a continuous body, holding by perpetual succession. Its power is not limited by any definite period of time, nor exhausted except by a performance of the thing it is empowered to do, unless circumstances have intervened to prevent. If the appellant had transferred the lots in question to an innocent purchaser, after the entry of the said statement, it might have had the effect to defeat the right of the council to correct the error committed; but that would have resulted from another principle of law. As the matter stood, however, I am convinced that it had full right to cause a proper statement to be entered in the city lien docket. It is true that the city had got Monastes' money bid for the lots on the bogus sale, but it had no right in justice to keep it. The sale under the proceedings was an assurance that the requirements of the charter had been complied with; and it has been held that when a sale is void the amount received by the city therefrom must be refunded. *Mayor of N. Y. v. Colgate*, 12 N. Y. 140, 147; *Corbin v. Davenport*, 9 Iowa, 239; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Newman*

*v. Supervisors of Livingston Co.*, 45 N. Y. 676. I can discover no good reason why such should not be the rule within the principle laid down by Judge FIELD in *Argenti v. San Francisco*, 16 Cal. 255-282. He there says:

"The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial."

Judge DILLON has attached sufficient importance to this language to incorporate it as a part of the text in his work on *Municipal Corporations*. Section 384, (2nd Ed.)

If the rule is as suggested, then Monastes can claim from the city the money paid, and the tax assessed against the lots must either be borne by the appellant or the tax-payers of the city generally. That the latter result would be an injustice and wrong could not be truthfully denied. For my own part, I am not willing to adhere to any capricious ruling in order to shield the appellant from the payment of her own debt, and enable her to shift it upon parties who have received no special benefit of the consideration out of which it arose. Nor do I believe the law, properly understood and administered, would countenance any such determination. I do not think the appellant is entitled to any relief in the case, and that the decision of the circuit court upon the demurrer should be sustained.

## SUPREME COURT OF CALIFORNIA.

(69 Cal. 120)

BYRNES v. CLAFFEY. (No. 9,301.)

Filed March 23, 1886.

## PAYMENT—APPLICATION OF PAYMENTS.

Money paid to a creditor on account of his debtor may, in California, be applied towards the extinction of any obligation due him by the debtor, unless the latter manifests an intention that the money should be applied to some particular obligation.<sup>1</sup>

Commissioners' decision.

Department 2. Appeal from superior court, county of San Mateo.

*E. A. & G. E. Lawrence*, for appellant.

*Fox & Ross*, for respondent.

SEARLS, C. This is an action upon a promissory note for \$900, made by defendant on the twentieth day of November, 1871, payable to plaintiff five days after date, with interest at 1 per cent. per month. Plaintiff had judgment for \$916.60, from which, and from an order denying a new trial, defendant appeals. Plaintiff was a merchant, and as such had an account with defendant, which, at the date of the note, was settled by the giving of such note. Defendant made two payments, one of \$374 on the twenty-eighth of December, 1871, and the other of \$101.40, about May 28, 1872, which were credited on the note. It appears that on September 24, 1873, plaintiff received for account of defendant from George Fox \$220, and in December, 1874, from one Kelso \$250; also in October, 1874, \$15 in cash, which sums defendant claims should be credited on the note. Plaintiff, on the other hand, asserts that defendant had in the mean time become indebted to him on a new book-account since the note was given in an amount in excess of the payments; that most of this was for cash advanced to defendant, and for mules sold to him, and that, as defendant did not direct him where to apply the payments, he applied them, at the date of payment, in part satisfaction of the open account.

The findings are in accord with the theory of the plaintiff, and are amply supported by the evidence. Indeed, about the only evidence which militates against plaintiff's theory is a statement of account made out by one Lovell, a clerk of plaintiff, since suit brought, in which defendant is allowed interest on the several payments as though made upon the note, and not upon the open account. This statement, plaintiff testifies, is not in accord with the books by him kept; and, as he presented his books at the request of the defendant, and as the latter makes no pretense that they contradict the testimony of the

<sup>1</sup> See note at end of case.

plaintiff, we may assume that they corroborate his statement. The testimony of Lovell also lends strength to the testimony of plaintiff, in several respects, though in others it seems to conflict therewith.

The Civil Code, § 1479, provides:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows: (1) If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation be manifested to the creditor, it must be so applied. (2) If no such application be then made, the creditor, within a reasonable time after such performance, may apply it towards the extinction of any obligation, performance of which was due him from the debtor at the time of such performance; \* \* \* and an application once made by the creditor cannot be rescinded without the consent of [the] debtor."

The payments were applied in accordance with this rule, and the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. O.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

#### NOTE.

A debtor, when making a payment, has the right to direct its application. *Michigan Air-line Co. v. Mellen*, (Mich.) 6 N. W. Rep. 845; *Miles v. Ogden*, (Wis.) 12 N. W. Rep. 81; *Mack v. Adler*, 22 Fed. Rep. 570.

The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor. *Nichols v. Knowles*, 17 Fed. Rep. 494.

A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule. *Id.*

A debtor may direct, upon paying money to his credit, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. *Mackey v. Fullerton*, (Colo.) 4 Pac. Rep. 1198.

Upon the neglect of a debtor to direct the application of payment made by him, the creditor may make such application as he sees fit. *Corliss v. Grow*, (Vt.) 2 Atl. Rep. 388. See *Marye v. Strouse*, 5 Fed. Rep. 483.

A creditor receiving payments without any directions as to application, may appropriate them to any debt, not illegal, even though it would not support an action; *e. g.*, a debt on which no action would lie by reason of the statute of frauds. *Haynes v. Nice*, 100 Mass. 327.

Where money has been received in part payment of a running account, and no specific application has been made of the same, a chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of the account was incurred. *Schuelenburg v. Martin*, 2 Fed. Rep. 747.

In a case of voluntary payments made by the debtor, where no application is made by either party, and there is but one continuous account of several items, forming one and not separate or distinct debts, the payment will be applied on the account according to the priority of time; that is, the first item on the debit side of the account will be discharged or reduced by the first item on the credit side. *Hersey v. Bennett*, (Minn.) 9 N. W. Rep. 590. See *Kenton Furnace & Manuf'g Co. v. McAlpin*, 5 Fed. Rep. 737.

The rule for the appropriation of payments on running accounts is that the first item on the credit side of the account will be applied to extinguish the first item on the debit side of the account. *Mack v. Adler*, 22 Fed. Rep. 570.

Payments on account, not applied by either party at the time, will be applied by the court as equity may require; and, in case of an open running account, would be ap.

plied to the earlier items, if that were necessary to prevent the running of the statute of limitations. *Hannon v. Engelmann*, (Wis.) 5 N. W. Rep. 791.

The law will apply a payment in the way most beneficial to the creditor, and therefore to the debt least secured. *Coons v. Tome*, 9 Fed. Rep. 532.

Where a mortgage is given to secure both an individual note of the mortgagor, and a note upon which he is a joint maker with another, the mortgagee may apply the mortgage first to the payment of the individual note, and will not be required to prorate the proceeds arising from a sale of the mortgaged premises upon both claims. *Small v. Older*, (Iowa,) 10 N. W. Rep. 734.

Where a mortgagor gave a note, including both a prior indebtedness not secured by mortgage, and also a debt secured by mortgage, and the mortgagee applied payments made to him upon the note generally, it was held equivalent to an application on the secured and unsecured indebtedness *pro rata*, and that he could not afterwards make a different application. *Sheldon v. Bennett*, (Mich.) 7 N. W. Rep. 223. See, also, *McMaster v. Merrick*, (Mich.) 2 N. W. Rep. 895.

A creditor foreclosing a mortgage on real property given him to secure the payment generally of several debts, after they became due him from the mortgagor, may, in the absence of any special equities between the parties, and in the event that the proceeds of sale of the mortgaged property are insufficient to satisfy all the debts so secured, apply such proceeds towards the payment of any one or more of such debts in full, leaving a balance unpaid in whole or in part; and a surety of the debtor on such unpaid debts cannot compel a different application of such proceeds. *Wilson v. Allen*, (Ore.) 2 Pac. Rep. 91.

(69 Cal. 122)

### WRIGHT v. SEYMOUR. (No. 8,906.)

Filed March 23, 1886.

#### 1. PUBLIC LANDS—MEXICAN GRANT—PATENT—CONFIRMATION—CONSTRUCTION.

The patent issued to a claimant upon the confirmation of a Mexican grant is the only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government.

#### 2. SAME—UNITED STATES PATENT—LANDS BORDERING ON TIDE-WATER—BOUNDARIES.

Under a United States patent to lands bordering upon a stream in which the tide ebbs and flows, the grantee, in the absence of an intent appearing in the patent to the contrary, does not acquire title to any land below high-water mark.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

*Henley & Oates*, for appellant.

*Sidney V. Smith & Son*, for respondent.

SEARLS, C. This is an action of ejectment to recover a parcel of land situate in the county of Sonoma. The cause was tried by the court without a jury, written findings filed, and judgment entered in favor of defendant, from which, and from an order denying a new trial, plaintiff appeals. Plaintiff's claim to the demanded premises is based upon a patent from the United States of America to Stephen Smith, dated April 18, 1859, which shows a grant of the Bodega ranch, lying between Russian river, the Pacific ocean, and Bodega bay. The description contained in the grant, so far as it borders on Russian river, is as follows: "To a stake marked 'B, 185,' on the bank of Russian River Station 185; thence, meandering down the Russian river north, 46 deg. 15 min. west, 19 chains, to Station 186, by 49, courses and distances, to the place of beginning." Plaintiff derails title from the original patentee.

The land in controversy, consisting of about 40 acres, constitutes an island in Russian river about one mile from its mouth at the Pacific ocean. The main channel of the river runs on the northerly side of the island, and south of it is a slough, by which it is separated from the main-land, between which and the island the water is, in places, very shallow, and, according to some of the witnesses, at low tide and in very dry time, has been known to entirely disappear near the lower end of the island. The evidence shows, further, that the ocean tides flow up the river to a point above the island. The river is not navigable for boats larger than canoes, skiffs, etc, and is not *in fact* a navigable stream for commercial purposes.

The question for determination is, does the land of plaintiff extend to the thread of the stream,—*usque ad filum aque*,—or is it bounded by a line at high-water mark on Russian river? If the former, then the channel of the river being on the north side of the island, constituting the demanded premises, the land falls within the prior grant, under which plaintiff holds, and he is entitled to recover; while if, under the calls of the grant, his boundary only extends to high-water mark, then and in that case the island is without the grant, and the construction placed by the court below upon the patent, under which the plaintiff claims, is the correct one.

Russian river, at the point in question, is a stream in which the tide ebbs and flows. At common law, all streams in which the tide ebbed and flowed were navigable streams, and those in which there was no flow and reflow of the tide were innavigable streams. This rule did not depend upon the navigability or non-navigability *in fact* of a stream, but upon the criterion afforded by the influx and reflux of the tide. A little reflection will suffice to convince the inquirer of the reasonableness of this rule in the land of its origin. The streams of England are all, of necessity, springing from the limited extent of the country, short, and, owing to the topography of the country and their limited flow of water, are not, *in fact*, as a rule, navigable until tide-water is reached. These facts borne in mind, and the reason of the rule is apparent. In the sense of the common law, Russian river, at the point indicated, is as completely a navigable stream as the Hudson at New York, or the Thames at London.

In the case of *Royal Fishery in the River Banne*, Davey, 149, it was resolved "that there are two kinds of rivers,—navigable and not navigable; that every navigable river, so high as the sea ebbs and flows in it, is a royal river, and belongs to the king, by virtue of his prerogative; but in *every other* river, and in the fishery of such other river, the terre-tenants on each side have an interest of common right, the reason for which is that so high as the sea ebbs and flows it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows." One of the results of this royal prerogative was that a grant of land extending to and bounded by or including a navigable stream within its boundaries, did not operate to pass title to

the bed of the stream, while a grant from the sovereign of land bordering upon a stream not navigable in the common-law sense—that is, above tide-water—would be presumed to extend to the thread of the stream. We must not be understood as indicating that at common law the bed of a navigable stream could not be granted to a subject by a sovereign, but only as saying that it did not pass, except in those cases where the specific intent to so grant was apparent in the conveyance.

"All rivers above the flow of tide-water are," says Angell, *Water-courses*, "by the common law, *prima facie* private; but when they are naturally of sufficient depth for valuable *floatage*, the public have an *easement* therein for the purposes of transportation and commercial intercourse; and, in fact, they are *public highways* by water. Public water-courses, in this last sense, are both public and private. They are or may be the objects of private ownership subject to public use." Ang. *Water-courses*, § 535. Such a river is "not a navigable river, however deep and large, in common-law language, being above tide-waters, but one under servitude to the public interest, and over the waters of which the public have a right to pass." *Spring v. Russell*, 7 Me. 290.

Tyler, in his work on *Boundaries*, after reviewing the authorities says:

"It may, then, be affirmed that it is a settled principle in the laws of this country and of England that the right of soil of owners of land bounded by the sea, or, which is the same, on navigable rivers where the tide ebbs and flows, extends, only to high-water mark; and that the shore below common but not extraordinary high-water mark belongs to the state, as trustee for the public."

In England the crown, and in this country the people, have the absolute proprietary interest in the shore of these waters, though it may by grant or prescription become private property. 3 Kent, Comm. (7th Ed.) 514, 515. But the grantee of such shore will not take a fixed freehold, but one that shifts as the shore recedes or advances, (*Scratton v. Brown*, 4 Barn. & C. 485;) "so that, in all cases where the land of a private individual is bounded upon sea, *prima facie* the boundary is the shore at ordinary high-water mark." Tyler, *Law of Boundaries*, 39. "The same principle which governs the question of boundary of property adjoining the sea applies to arms of the sea, estuaries, and navigable rivers below tide-water." Tyler, *Bound.* 40; Washb. *Real Prop.* 633, 634; Ang. *Tide-waters*, § 74; Hale, *De Jur. cap.* 4; *Canal Com'rs v. People*, 5 Wend. 443; *Canal Com'rs v. Kempshall*, 26 Wend. 414. The lands under water, where the tide ebbs and flows, belong to the state by virtue of her sovereignty, and, in the absence of an express showing to the contrary, it will not be presumed that the government of the United States intended to convey it. *Up-ham v. Hosking*, 62 Cal. 250; *Guy v. Hermance*, 5 Cal. 74; *Chapin v. Bourne*, 8 Cal. 295; *Teschmahcer v. Thompson*, 18 Cal. 11; *People v.*

*Morrill*, 26 Cal. 353; *Rondell v. Fay*, 32 Cal. 364; *Ward v. Mulford*, Id. 372; *More v. Massini*, 37 Cal. 432.

The doctrine of the common law in reference to the rights of riparian proprietors upon streams which are navigable in fact, though not subject to the flow and reflow of the tide, has been modified in some respects in many of the states of the Union. In Pennsylvania, Alabama, Tennessee, and some other states the doctrine is held that in all streams navigable in fact the riparian proprietor only takes to low-water mark, the soil and water formed between the lines that described low-water mark being retained as eminent domain for the use of all citizens, and that the right of navigation in all such navigable waters is the paramount public right of every citizen. *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Monongahela B. Co. v. Kirk*, 46 Pa. St. 112; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Elder v. Burrus*, 6 Humph. 356-358. We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a tidal stream, in the absence of an express intention so to do, has been construed to pass title to any land below high-water mark, and the doctrine of sections 830 and 670 of our Civil Code is believed to be but a declaration of the law on this subject as it has existed since the formation of our state government.

Section 830 is in the following language:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark. When it borders upon a navigable lake or stream where there is no tide, the owner takes to the edge of the lake or stream at low-water mark. When it borders upon any other water the owner takes to the middle of the lake or stream."

Section 670, *supra*, is as follows.

"The state is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide-water within the state; of all land below the water of a navigable lake or stream," etc.

The description in the patent under which plaintiff claims is such as would be sufficient to include the bed of Russian river to the thread of the stream, were such a river a private stream, and is not sufficient in law to convey the land in a tide-water stream below high-water mark.

The contention of appellant that his title is derived from the government of Mexico; that the patent from the United States government was simply a confirmation of pre-existing rights under the grant; that at the date of the grant the common law did not exist as a rule of action or decision in California, and consequently that as none of the rights of the patentee conferred by the preceding sovereignty can be divested,—is substantially correct.

But the question remains, what were those rights? When we answer this question, in the light of the evidence presented by appellant through the patent of his grantor, we are constrained to say that

he has failed to show any right to the land in question. *More v. Masini*, 37 Cal. 435. We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related; and that, upon confirmation, the patent issued to the claimant is the evidence, and only evidence, of the extent of the grant, and the terms used in such patent relating to extent and boundaries is subject to like rules of construction with other grants from the government. Had the government found the claimant entitled to the bed and banks of a tide-water stream we must suppose it would have used in the patent apt words for its conveyance. Not having done so, the presumption is that it was not intended to convey the bed of the stream.

The witness Cox, to whose testimony appellant now takes exception, appears to have been introduced without objection, and the motion afterwards made to strike it out cannot avail the appellant. *People v. Long*, 43 Cal. 446.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(69 Cal. 149)

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*In re HANG KIE.* (No. 20,122.)

Filed March 24, 1886.

CONSTITUTIONAL LAW—VALIDITY OF LAUNDRY ORDINANCE.

Under the California constitution, the city of Modesto has power to prohibit the conduct of the business of a public laundry or wash-house in the city except within certain prescribed limits.<sup>1</sup>

In bank. Application for writ of *habeas corpus*.

*S. W. Geis*, for petitioner.

*Schell & Bond*, *A. K. Pritchett*, and *Alfred Clarke*, for respondent.

MORRISON, C. J. Petitioner complains that he is unlawfully restrained of his liberty because the ordinance under which he was arrested and imprisoned is unlawful and void. On the second day of July, 1885, the board of trustees of the city of Modesto passed an ordinance in the following language:

"It shall be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are washed and cleansed for hire, within the city of Modesto, except within that part of the city which lies west of the railroad track and south of G street."

A section of the ordinance further declares that any laundry carried on in violation of the foregoing section is a nuisance, and, by

<sup>1</sup>See note at end of case.

section 3, a violation of the ordinance is declared a misdemeanor, punishable by fine and imprisonment, or both. The defendant was charged with a violation of the ordinance, and is now suffering by imprisonment the penalty thereof, from which he seeks to be relieved, on this application, under the *habeas corpus* act.

The only question submitted for our consideration involves the legality of the ordinance in question; or, in other words, the power of the board of trustees of the city of Modesto to pass it. The objections to the ordinance are two: (1) That it is *unreasonable*, the rule being that when a power to pass an ordinance is not given in *express terms*, but is derived from a general power to legislate, the ordinance must be reasonable. *Ex parte Chin Yan*, 60 Cal. 78. (2) That it violates the state constitution, art. 1, §§ 11, 21, inasmuch as it is not uniform. Both of these objections seem to be answered by *Ex parte Moynier*, referred to hereafter. It is claimed, in answer to the prayer of the petitioner for a discharge, that the power exercised by the board of trustees was duly vested in that body, not only under the act approved March 13, 1883, but also under the provisions of the state constitution. We will confine ourselves to a consideration of the powers vested in the municipal corporation by the constitution, as that will be sufficient for the present case.

By section 11 of article 11 of the constitution it is provided "that any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." In the case of *Ex parte Moynier*, 2 Pac. Rep. 728, this court had under consideration an ordinance very similar in its provisions to the one now under consideration, and held that the power exercised by the board of supervisors of the city and county of San Francisco, fixing certain limits in the city for the carrying on of the laundry business, was properly exercised under the section of the constitution above referred to. The opinion in that case says: "That the regulations of the order are, as to portions, (perhaps all,) police regulations, and as to some sanitary, we have no doubt." And in the case of *Barbier v. Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, the supreme court of the United States in a laundry case says:

"The fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from 10 o'clock at night until 6 o'clock in the morning of the following day. \* \* \* The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies."

The case of *Soon Hing v. Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730, which was also of the same character, lays down the same doctrine. Other cases might be referred to, but a decision of the supreme court of this state, and two of the supreme court of the United

States, holding such an ordinance to be a police or sanitary regulation, are deemed sufficient.

We can see nothing unreasonable in the ordinance, but, on the contrary, good reasons may have moved the board of trustees to pass the order in question.

Writ dismissed, and petitioner remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.; ROSS, J.

NOTE.

It was held in *Re Yick Wo*, (Cal.) 9 Pac. Rep. 139, that under the California constitution the board of supervisors of the city and county of San Francisco has power to prevent the establishment, maintenance, or carrying on of laundries except in brick or stone buildings, unless the consent of such board to do otherwise is first obtained.

In the case of *Barbier v. Connolly*, 5 Sup. Ct. Rep. 357, it was said by the United States supreme court that class legislation—discrimination against some in favor of others—is prohibited by the fourteenth amendment to the constitution of the United States; but that the legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment; that neither the fourteenth amendment, nor any other amendment, to the constitution of the United States was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, or good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

In *Soon Hing v. Crowley*, 5 Sup. Ct. Rep. 730, it is said that the specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind; and that it is not discriminating legislation that branches of the same business, from which danger is apprehended, are prohibited during certain hours of the night, while other branches, involving no such danger, are permitted.

(69 Cal. 146)

HAHN and others v. GARRATT. (No. 9,045.)

Filed March 24, 1886.

ANIMALS—TRESPASSING CATTLE—FENCING LANDS.

Owners of land in Santa Clara county are not required, under the California statute of April, 1863, as amended in March, 1872, to fence such land against the cattle of others; and where the owner of cattle allows them to stray upon another's land, and do damage, he is liable for the damage done, whether the land was fenced or not.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

*John Reynolds* and *C. D. Wright*, for appellant.

*Burt & Pfister*, for respondents.

BELCHER, C. C. This was an action to recover damages for trespasses committed by the defendant's cattle upon the plaintiffs' crops. The plaintiffs' land was situate in Santa Clara county, and was not inclosed. At the trial the defendant asked the court to instruct the jury that the plaintiffs could not recover without first showing that the premises on which they claimed the trespasses were committed, were inclosed by a substantial fence, sufficient to prevent the ingress of stock, or that the defendant had voluntarily and intentionally

herded his stock upon the plaintiffs' land. The court refused so to instruct the jury, but did instruct them as follows:

"In this county a man is not bound to fence his land against the trespasses of the cattle of his neighbor. The owner of the cattle in this county must fence in his cattle, or in some way keep them from trespassing upon his neighbor's premises. \* \* \* In this case, it makes no difference whether the plaintiffs' premises were inclosed with any inclosure or not, the defendant was bound to take such care of his cattle as would prevent them from trespassing upon the premises of plaintiffs."

The refusal to instruct the jury as requested, and the giving of the above instructions, constitute the only errors assigned in the case.

It is claimed for the appellant that the rule of the common law of England which required every man to keep his cattle within his own close, and made him liable in damages for all injuries resulting from their being permitted to range at large, has never prevailed in this state, and counsel cite, in support of this view, *Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Cal. 308; and *Logan v. Gedney*, 38 Cal. 581. When the common law was adopted, in 1850, it was made the rule of decision in all the courts of this state, so far as it was not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state. At that time the principal industries of the state were mining and cattle-raising. To encourage and promote these industries, acts were passed by the legislature, before the adoption of the common law, which have been held to be inconsistent with some of its rules, and, among others, with that above referred to. Since then farming and fruit-raising have become important industries, and to encourage and protect them, special acts have been passed for some of the counties which in effect restored the rules of the common law. One of these acts was passed in April, 1863, entitled "An act concerning estrays, and animals found running at large, in the county of Santa Clara." St. 1863, p. 581. This act was amended in March, 1872, (St. 1871-72, p. 580,) and section 1, as amended, reads as follows:

"Any person finding at any time an estray horse, mare, mule, jack, jennet, or any estray cattle, sheep, hogs, or goats, or any number of such animals, upon his farm, land, or other premises, or any person finding any or all such animals running at large upon any public street, road, lane, alley, avenue, highway, square, or any other public thoroughfare, whether the owners of such animals are known or unknown, may take the same up, and proceed therewith as hereinafter directed; and no person shall remove such animals from the possession of the taker-up, or from the possession of the officer into whose hands they may be placed for the purpose of sale, except as hereinafter provided. Any of the above-named animals herded or found grazing upon any public street, road, highway, avenue, alley, or public square, or upon private property, without the consent of the owner thereof, whether accompanied by a herder or not, shall be deemed and held to be estrays, and animals running at large, within the meaning of this act, and shall be dealt with as hereinafter provided, and be subject to the penalties herein named."

It is then provided that the person taking up such animals shall confine them in a secure place, and shall post notices containing a

description of the animals taken up, etc., and that unless the owner shall appear and claim the property and pay certain damages within 10 days, the animals shall be sold at public sale "in conformity with the law concerning sales on execution." It is further provided by section 8 that "all acts and parts of acts in conflict with this act are hereby repealed, so far as they relate to the county of Santa Clara: provided, that nothing herein contained shall be construed so as to deprive any person of the right to sue and recover damages for trespass by any animals mentioned in this act."

It is very evident from this that in 1882, when the trespasses complained of here were committed, the owner of land in Santa Clara county was not required to fence it against his neighbor's cattle, and that if the owner of cattle allowed them to stray upon another's land and do damage, he at once became liable for the damage done, whether the land was fenced or not.

As we find no error in the action of the court below, the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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(69 Cal. 142)

WOODSUM v. COLE. (No. 9,300.)

Filed March 24, 1886.

1. PROMISSORY NOTE—INDORSEMENT AFTER MATURITY.

The indorsee of a promissory note after maturity is not an indorsee in due course, and therefore does not acquire an absolute title to the note so that it is valid in his hands notwithstanding defects in the title of the party from whom he acquired the note.

2. SAME—ACTION—PARTIES—REAL PARTY IN INTEREST.

Actions must be prosecuted in the name of the real party in interest, in California, and therefore, to entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right of possession of the instrument, and such ownership must be sufficient to protect the defendant upon a recovery against him from a subsequent action, and the defendant in such action may show that plaintiff was not the legal owner of the note, and paid no money or value therefor.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

*S. O. Houghton*, for appellant.

*C. D. Wright* and *S. F. Leib*, for respondent.

BELCHER, C. C. This is an action to recover the amount due on a promissory note. The plaintiff sues as indorsee of the note, and the defendant, by his answer, denies that the plaintiff has any right or title to the note, or any interest in the money due thereon; and

alleges that one A. C. Woodsum, the payee named therein, is the owner of the note, and entitled to receive payment thereof, and that, before the commencement of this action and since, he had directed the defendant not to pay the same to any person other than himself; and, further, that A. C. Woodsum had extended the time of payment, and the note was not due or payable when the action was commenced. It appears from the record that the note was dated October 2, 1880, and was payable to the order of A. C. Woodsum, 90 days after its date. It was really the property of Abby F. Woodsum, wife of the payee, and shortly after he received it, he indorsed it in blank, and delivered it to her. She retained it for some time, and then delivered it back to him, to hold and collect as her agent. Afterwards, about the tenth or twelfth of March, 1881, at his request, and while he was holding the note, V. B. Woodsum indorsed his name upon the back of it, and A. C. Woodsum then borrowed some money of other parties, and used the note as collateral security. This loan was paid, and the note returned. After that A. C. Woodsum delivered the note to V. B. Woodsum, and directed him to see Cole, the maker, and get the money due on it if he was ready to pay, but he gave him no authority to institute any action upon it. V. B. Woodsum reported that he had seen Cole, and that Cole had no money just then, and was not ready to pay. Subsequently, but before this action was commenced, A. C. Woodsum saw Cole, and told him he could have until January 1, 1883, in which to pay the note. No consideration ever passed from V. B. Woodsum to A. C. Woodsum for the note, but while he held it, as above stated, he delivered it to his wife, who is the plaintiff here. The plaintiff was called as a witness in her own behalf and testified that she received the note in March or April, 1881, and that ever since then it had been in her possession or in that of her attorney. On cross-examination she was asked if any money was paid by her at the time she received the note, and the question was objected to as irrelevant and immaterial. The objection was overruled, and thereupon she answered that "the note was delivered to her by V. B. Woodsum in part payment of a sum of money owing by him, but no money was paid by me." Upon the facts the court below was of the opinion that the plaintiff was not entitled to recover, and thereupon judgment was rendered in favor of the defendant. The appeal is from the judgment and an order denying a new trial.

1. It is clear that V. B. Woodsum was not the owner of the note, and was never authorized to do anything with it, except to see Cole and receive the money if he was ready to pay it. It is equally clear, as the note was overdue when it was delivered to plaintiff, that she was not "an indorsee in due course," and so did not acquire an absolute title thereto, so that it was valid in her hands notwithstanding any defect in the title of the person from whom she acquired it. Civil Code, §§ 3123, 3124.

2. If the plaintiff has any right which she can assert to the note, it must be because she obtained it under such circumstances as estop the true owner from claiming it as against her. The principle is well established that "where the true owner holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Brewster v. Sime*, 42 Cal. 147; *Barstow v. Savage Min. Co.*, 64 Cal. 388; S. C. 1 Pac. Rep. 349; *Chase v. Whitmore*, 9 Pac. Rep. 942. But we are unable to see how the plaintiff can avail herself of this principle. There is nothing to show that she was an innocent purchaser of the note. No attempt was made to prove that, when she took it, she had not full knowledge of all the circumstances under which, and the purposes for which, V. B. Woodsum held it. The burden was upon her to show her innocence and good faith, and that was not accomplished by the mere production of the note, and showing when and from whom she obtained it.

3. In this state actions must be prosecuted in the name of the real party in interest. Section 267, Code Civil Proc. To entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right of possession of the instrument; and such ownership must be sufficient to protect the defendant upon a recovery against him from a subsequent action. It was competent, therefore, for the defendant to show, if he could, that the plaintiff paid no money for the note, and was not the legal owner of it. *Hays v. Hathorn*, 74 N. Y. 486; *Towne v. Wason*, 128 Mass. 517.

4. The findings are sufficient, and we think the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(69 Cal. 241)

*In re Estate of SCHEDEL. (No. 11,479.)*

Filed March 31, 1886.

**APPEAL—APPEAL FROM ORDER OF DISTRIBUTION—EFFECT TO STAY PROCEEDINGS.**

On an appeal taken by a legatee from a decree of distribution, the execution of the undertaking provided for by section 941 of the California Code of Civil Procedure, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300, stays proceedings in the court below, upon the judgment appealed from.

Department 1. Appeal from superior court, city and county of San Francisco. Application for order staying proceedings in court below pending appeal.

*Marcus Rosenthal*, for petitioner.

Ross, J. The question in this case is whether, on appeal taken by a legatee from a decree of distribution, the execution of the undertaking provided for by section 941 of the Code of Civil Procedure, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300, stays proceedings in the court below upon the judgment appealed from. Under the provisions of our Code we think it does. Section 949 of the Code of Civil Procedure reads:

"In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state; and except, also, where the order grants, or refuses to grant, a change of place of trial of an action."

The provisions of sections 942, 943, 944, and 945 have no application to the case of an appeal by a legatee from a decree of distribution. It is not claimed for the respondent that any of them do, unless the case comes within the "spirit" of section 943, which provides:

"If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

It is a sufficient answer to the suggestion to say that the decree appealed from does not direct the assignment or delivery of any documents, nor the assignment or delivery of any personal property,

within the meaning of that section. The decree appealed from distributes certain moneys; but money is not included within the "personal property" spoken of in section 943. Sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language. But the appellant in the present case is not required to do anything. It feels aggrieved by the decree, however, and has the right of appeal. The case is one "not provided for in sections 942, 943, 944, and 945," and consequently, by the terms of section 949, the perfecting of the appeal, by giving the undertaking mentioned in section 941, stays proceedings in the court below upon the judgment appealed from.

Let the order issue.

We concur: MCKINSTRY, J.; MYRICK, J.

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(69 Cal. 239)

*In re Estate of ARMSTRONG.* (No. 9,434.)

Filed March 31, 1886.

**EXECUTORS AND ADMINISTRATORS — SPECIAL ADMINISTRATOR — INDEBTEDNESS, CHARGEABLE IN ACCOUNT.**

A person indebted to a decedent, and who is appointed special administrator of his estate, is, upon settlement of his account as such special administrator, properly charged by the probate court with the amount of the indebtedness.

Department 1. Appeal from superior court, city and county of San Francisco.

*E. D. Sawyer*, for appellant.

*Maurice B. Blake*, for respondent.

*J. M. Allen*, for certain heirs.

ROSS, J. The question in this case is whether a person, indebted to the deceased, and who was appointed special administrator of the estate, was, upon the settlement of his account as such special administrator, properly charged by the probate court with the amount of the indebtedness. It is admitted for the appellant that, if he had been the general administrator, he would have been properly chargeable, but it is claimed that, under the provisions of the statute in respect to special administrators, such a charge is not permissible. The duties of a special administrator are thus defined by section 1415 of the Code of Civil Procedure:

"The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands, of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator. He may sell such perishable property as the court

may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the deceased."

Among the duties thus devolved by statute upon the special administrator is that of collecting the debts of the estate; and for that and other like purposes the right to commence and maintain suits and other legal proceedings as an administrator is conferred upon him. And by section 1417 of the same Code it is provided that "the special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do."

It was the duty of the special administrator in this case to collect the debts due the estate for which he was acting, and to bring suit where necessary for the purpose. But he could not sue himself. Yet the statute of limitations might work a bar of his debt during his administration, unless (the debt being due) he is to be deemed to hold the amount due in his hands, and accountable for the same on the settlement of his administration. It is so with ordinary administrators, as is conceded by appellant's counsel, and we discover nothing in the provisions of the statute in respect to special administrators that demands or would warrant the application of a different rule as to them. Order affirmed.

We concur: MCKINSTRY, J.; MYRICK, J.

(68 Cal. 244)

SANKEY v. LEVY, Judge. (No. 11,394.)

Filed March 31, 1886.

**MANDAMUS—NOT REMEDY FOR CORRECTION OF ERROR.**

*Mandamus* does not lie to correct the error of a superior court in rendering a judgment in a case on appeal from a justice's court, without filing findings of fact.

Department 1. Application for *mandamus*.

*S. Sankey*, for petitioner.

By THE COURT. This is an application for a writ of mandate to compel the respondent to restore to the calendar of the superior court a case tried in that court some two years ago on appeal from a justice's court. The ground of the application is that the superior court rendered judgment in the case without filing findings of fact. But, at most, this was but error, for the correction of which *mandamus* does not lie. Writ denied, and proceedings dismissed.

## CROWELL v. BROWN. (No. 11,375.)

Filed March 31, 1886.

## APPEAL—FAILURE TO FILE POINTS AND BRIEF.

Judgment affirmed for failure to file points and authorities.

In bank. Appeal from superior court, county of Sacramento.

*Henry Edgerton*, for appellant.*S. C. Denson, W. H. Beatty, and J. W. Armstrong*, for respondent.

BY THE COURT. Appellant's counsel having failed to file points and authorities as authorized by the order of the court made December 8, 1885, the judgment is affirmed.

(68 Cal. 506)

## GAVITT v. MOHR. (No. 11, 248.)

Filed January 30, 1886.

## 1. PUBLIC LANDS—STATE LANDS—TO WHOM THEY MAY BE GRANTED.

By section 8 of article 17 of the constitution of California, state lands suitable for cultivation shall be granted only to actual settlers.

## 2. SAME—WHO IS AN ACTUAL SETTLER.

An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state.

## 3. SAME—RIGHT TO GRANT—HOW EARNED BY SETTLER.

An actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications required by law, an inchoate right to purchase the land, and operates as notice to all the world of the right.

Department 2. Appeal from superior court, Los Angeles county.

*J. R. Scott and F. H. Howard*, for appellant.*A. W. Hutton*, for respondent.

McKEE, J. This action is brought to have determined which of two applicants had the right to purchase from the state a tract of agricultural land situate in Los Angeles county, and known as the N.  $\frac{1}{2}$  of section 36, township 6 N., range 12 W., San Bernardino meridian line. It is conceded that the thirty-sixth section, of which the land involved in the contest is part, belonged to the state; that prior to April, 1872, the township was surveyed and sectionized by the United States; and that the plat of survey was approved and filed in the local United States land-office of the district in which the land is situate. The first application to purchase was made by defendant. On the sixth of June, 1864, he caused to be filed his affidavit, in due form, made under the provisions of title 8, pt. 3, Pol. Code, (section 3495, Pol. Code,) paying all the fees and charges of the application; and at the time of making and filing his application

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he had the qualifications prescribed by law for becoming a purchaser from the state. The application of plaintiff was not made and filed until 60 days after the defendant's application had been filed. On the eleventh of August, 1884, he made his affidavit, in due form, under the provisions of the same law, and filed it with the surveyor general of the state, paying the costs and charges, and he also was, at the time of his application, possessed of the qualifications requisite to purchase.

The court decided in favor of plaintiff, finding "that, prior to any settlement upon the land by defendant, the plaintiff, on the thirtieth of July, 1884, entered and settled upon the land; that he has since continuously resided upon it; that he was an actual settler upon it on the eleventh of August, 1884, when he made and filed his application to purchase it; and that the defendant was not an actual settler upon the land at the time of filing his application, nor an occupant of it at any time prior to the fifth of August."

Section 3 of article 17 of the constitution declares: "Lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." And section 3495 of the Political Code, after prescribing the conditions and terms for purchasing cultivable land from the state, provides that an applicant to purchase must make and file an affidavit in the office of the surveyor general of the state, setting forth the qualifications of the applicant, the character and condition of the land which he wants to purchase, whether the land is or is not suitable for cultivation, and, if it is, that the applicant is an actual settler thereon. Under the law, therefore, a claimant to purchase from the state a tract of its cultivable land must be, at the time of filing his application, an actual settler.

An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession, for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state. For that purpose, an actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice to all the world of the right. Now the finding that defendant was not an actual settler when he applied to purchase the land is founded upon evidence which tended to show "that on May 27, 1884, he caused a survey of the land to be made; had hauled upon it about \$20 worth of lumber, with which he, assisted by a companion, commenced to build a house 8 by 10 feet; that he had laid the foundation of the house, consisting of 2 by 4 timbers; had erected at each corner two corner boards, which were joined on

top by 2 by 4 cross-pieces ready for the sides, and for the rafters of the roof; also had cut part of the boards for the sidings, and put down a temporary floor, which he and his companion, while working on the house, occupied until early in June, 1884, when defendant went to Los Angeles to make his application to purchase; and having done so, returned to the land, when he was taken ill; and about the seventh of June he left the land and went to the house of a friend, several miles away, where he lodged during his sickness until about the first of August, except that at occasional intervals in the months of June and July he returned to the land, resumed work upon it, and by the last of July he had the house roofed in, and furnished with a bed, a table, and some boxes, and he himself went into the house about the fifth of August, and since then he has continuously resided there.

That being the evidence of the defendant's settlement, the question arises whether it warrants the finding that defendant was not an "actual settler" on the sixth day of June,—the day that he made and filed his application to purchase the land from the state. We think the evidence sufficiently showed that the land was subject to settlement when the defendant entered upon it; that he entered to make a settlement thereon; and that, in the exercise of his right, he began making his improvements upon the land with a view to future occupancy and residence thereon. These acts, and the occupation of the land while engaged in performing them, gave the defendant the *status* of an actual settler in the sense of the law which authorized him to purchase; and as he made and filed his application to purchase while engaged in the act of settlement, the law protected him for 60 days after settlement. Pol. Code, § 3497. The finding that the defendant was not an actual settler at the time of filing his application is therefore against the evidence.

Appellant also challenges the finding that the plaintiff was an actual settler at the date of *his* application. The finding is also based upon evidence which tended to show that in June, 1884, plaintiff was on the land for about 10 days, and passed over it several times. At that time he saw no one in personal occupation of it; but there was some lumber on the land, and the appearance of the commencement of a house,—“there were sills and four corners put up, and about two hundred or three hundred feet of lumber there.” Leaving the land in that condition, the plaintiff did not return to it until about the last of July, when he discovered that “some more work had been done on the shanty, and that it was about completed.” At that time, according to the evidence, “the shanty was eight feet by ten feet, nine feet high, and seven feet in rear;” and, as there was no one living in it, he “on the thirtieth of July, 1884, entered and settled upon the land by pitching upon it a cloth tent, in which he resided; and afterwards he built on the land a corral sixteen feet long and eighteen feet wide, one side of which was a cedar thicket, in which he stored some

hay, and sunk a well ninety-eight feet deep," and continued to reside there until the first of January, 1885, when he gathered his tent, removed it from the land, and never put it back.

Where there is no adverse occupancy of public land, a settler has the right to enter upon it for the purpose of making a settlement. But when he makes an application to purchase the land, he must make an affidavit \* \* \* that there is no occupancy of such land adverse to any that he has. Pol. Code, § 3495. An affidavit to that effect was made by the plaintiff on the eleventh of August, 1884; and the court finds that at that time there was no occupation of said lands adverse to the occupation of plaintiff. But the uncontradicted evidence shows that the defendant had finished his house by the last of July, and moved into it on the fifth of August, and thereafter continued to reside there, and was in the adverse occupancy of the land when the plaintiff made his affidavit as the basis of his application to purchase; therefore the finding is not sustained by the evidence, and the conclusion that the plaintiff was entitled to purchase the land is illegal.

Judgment and order reversed, and cause remanded for a new trial.

ROSS and MCKINSTY, JJ., concurred.

## SUPREME COURT OF OREGON.

(13 Or. 246)

NEPPACH, Adm'r, etc., v. JORDAN.

Filed March 10, 1886.

## 1. APPEAL—NOTICE—ESSENTIALS.

The notice of appeal must be directed to the adverse party, and must inform him that the appellant appeals from the judgment.

## 2. SAME—QUESTION OF SUFFICIENCY OF NOTICE.

The question whether the notice is sufficient to give the appellee actual knowledge of the appellant to appeal cannot be gone into.

## 3. SAME—JUDGMENT—DESCRIPTION OF.

A judgment is sufficiently described when the court in which it is rendered is given, the names of the parties to the judgment, the date of the judgment, and for what it is rendered.

Appeal from Multnomah county.

E. O. Dowd, for appellant.

Alex. Bernstein, for respondent.

BY THE COURT. Judgment was rendered against Jordan in a justice's court. Jordan appealed to the circuit court. In the circuit court the appellee in the appeal moved to dismiss the appeal, for the reason that the notice of appeal was insufficient in this: (1) That it failed to describe the court in which the judgment was rendered; (2) that it failed to describe the parties; (3) that it failed to describe the judgment. The notice was of the tenor following:

"IN JUSTICE'S COURT FOR COUCH PRECINCT.

"*William Neppach, Plaintiff, v. W. P. Jordan, Defendant.*

"NOTICE OF APPEAL—CIVIL ACTION.

"*To William Neppach, and Chas. H. Hewett, your Attorney:* Please take notice that the defendant in the above-entitled action appeals from the judgment rendered and entered therein on the fifth day of June, A. D. 1885, in favor of the said plaintiff and against the said defendant, for the possession of the premises described in the complaint herein, and costs and disbursements, and from the whole of such judgment, to the circuit court of the state of Oregon, for the county of Multnomah.

"E. O. DOWD, Atty. for Defendant."

The notice of appeal must be directed to the adverse party, and must inform him that the appellant appeals from the judgment. As the notice is a species of judicial process, (JACOBS, J., in *Driver v. McAllister*, 1 Wash. T. 368,) whose sufficiency must appear to the court on its face, the question whether the notice is sufficient to give the appellee actual knowledge of the intention of the appellant to appeal cannot be gone into. The court must be able to identify the judgment from the notice. Can it do so in this case? Evidently so. A judgment is sufficiently described when the court in which it is rendered is given, the names of the parties to the judgment, the

date of the judgment, and for what it was rendered. *Lewis v. Lewis*, 4 Or. 209. This notice gives the court, the names of the parties, the date, and that the judgment was for the possession of the premises described in the complaint. It was not necessary to give a description of the premises in the notice itself. That is certain which can be made certain by reference to some paper in the case of which the court can take judicial notice. It is asserted as a fact that the judgment was given for the possession of certain premises, which are as much identified to the court as if set out *in hæc verba* in the notice. If the record of the judgment itself should show a judgment for premises other than those described, it would be fatal at the trial, not because the notice was technically defective, but because the appellant is unable to produce the record he has described: A notice is also sufficient in which the essential facts required in a notice may be made out by reasonable intendment. *Pettingill v. Donnelly*, 27 Minn. 332; S. C. 7 N. W. Rep. 360. Again, had the notice been insufficient, as the court below held, it was error to render any other judgment than that of dismissal. Judgment reversed.

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(13 Or. 271)

**HAWTHORNE and others v. CITY OF EAST PORTLAND and others.**

Filed March 17, 1886.

**1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—VALIDITY—COMPLIANCE BY OFFICER WITH LAW.**

In order to improve a street in the city of East Portland, and legitimately charge the expense thereof upon the lots fronting and abutting upon it, the several duties imposed by the city charter upon the proper officers of the municipal government must be strictly performed, and the conditions authorizing such improvement and charges exist.

**2. SAME—RIGHTS OF LOT-OWNERS—OBJECT OF REQUIRING NOTICE.**

Lot-owners who are compelled to pay the expenses of such a proceeding, or have their property sold to satisfy it, should be apprised of the character and extent of the improvement intended. That is the object of requiring the notice.

**3. SAME—DOCKET OF LIENS—WRONG NAME THEREIN—WHEN SUCH DEFECT NOT FATAL.**

An assessment for a street improvement, if otherwise regular, would be valid if the auditor took a certificate of the city clerk stating who was the owner of the lot, and entered the name so certified in the docket of city liens, although it was not in fact the name of the owner; but in such case it would have to be the name of a person who could be such owner.

**4. SAME—CHARGE UPON PROPERTY, NOT PERSON—LIEN.**

A tax for street improvement is not against the person,—it is against the property; and to render it valid, the act under which it is levied must be complied with in terms, and when that is done, no matter what those terms are, it becomes a legal charge upon the property.

**5. SAME—"IMPROVEMENT"—"REPAIR"—TEST.**

As to whether work done, under authority of the city charter, upon a street, is an "improvement" or a "repair," the test is the method of charge; if the expense is a charge upon adjacent property, it is an improvement.

**6. SAME—ONE WHO IS BENEFITED BY SUCH IMPROVEMENT MAY NOT OBJECT.**

Equity will not permit a party who encourages an improvement to be made, from which he derives a benefit, to question thereafter the legality of such an improvement.

*Killen & Moreland*, for respondents.  
*S. R. Harrington*, for appellants.

THAYER, J. This appeal is from a decree of the circuit court for the county of Multnomah, rendered in a suit brought by the respondents against the appellants to enjoin the appellants from selling certain city lots owned by them in the said city of East Portland, by virtue of a street assessment which had been levied thereon for the improvement of L street, in said city; the respondents claiming that the assessment was illegal upon the grounds that the requirements of the city charter had not been complied with in the improvement of said street, and that it had before been improved, and by the provisions of the charter was not subject to be again improved.

The charter of said city points out the various steps required to be taken in such cases. When any such improvement is to be made the common council must cause the recorder to give notice of the same by publishing a notice for 14 days previous to the undertaking in some daily or weekly newspaper published in said city or in the city of Portland, specifying with convenient certainty the street, or part of street, proposed to be improved, and the kind of improvement to be made. Within 10 days after the final publication of such notice the owners of a majority of the property adjacent to such street proposed to be improved may file a remonstrance with the recorder against the improvement, in which case it cannot be further proceeded with. But if no such remonstrance be filed, the council, within six months from the final publication of the first notice, may commence to make the improvement. The first step is to ascertain and determine the probable cost of making the improvement, and assess upon each lot or part thereof liable therefor its proportionate share of such cost. When the probable cost of the improvement has been ascertained and determined, and the proportionate share thereof of each lot, or part thereof, has been assessed, the council must declare the same by ordinance, and direct its clerk to enter a statement thereof in the docket of the city liens, which is a book provided for that purpose, and in which must be entered the number or letter of the lot assessed, and of the block in which it is situated; and where a separate assessment is made upon a part of a lot, such part must be particularly designated. The name of the owner of the lot or such part must also be entered therein, or an entry made that the owner is unknown; and also the sum assessed upon such lot, or part thereof, and the date of the entry. From the date of such entry of an assessment upon a lot, or part thereof, the sum there entered is to be deemed a tax levied and a lien thereon, but it cannot be collected until, by order of the council, 14 days' notice thereof is given by the recorder, by publication in one of the newspapers before mentioned, and such improvement of the street fronting or abutting upon such lot, or part thereof, has been com-

pleted. Then the council may order a warrant for the collection of same to be issued by the auditor, directed to the city marshal, requiring him to levy upon such lot, or part of lot, upon which the assessment is unpaid, to sell the same, which warrant shall have the force and effect of an execution, and be executed in like manner, subject to certain regulations prescribed in the said charter. The council must provide by ordinance for the time and manner of the work on any proposed improvement; must let the work to the lowest bidder; and when a street, or part thereof, has once been improved, under and by virtue of said provisions before mentioned, it is not subject to be again improved, but may be repaired, except that when the improvement of such street has only been a partial improvement the council is authorized to make a full improvement as in the case of an original improvement of a street, and subject to the same restrictions and qualifications.

This, substantially, is the power conferred upon the officers of said city in regard to the improvement of streets, and the mode of exercising it. The authority and manner of executing it are similar in principle to that possessed by a great majority of the municipal corporations in the United States. The law applicable to the subject in general is definitively settled. That it is a special and limited power, and that it can only be exercised in the mode pointed out in the act which grants it, admit of no question. No officer of any municipal government should be ignorant upon that point, or fail to understand that a street improvement cannot be made, and the expense thereof legally assessed upon the adjoining lots, without a strict observance of every requirement of the city charter upon the subject. It is in that respect like every restricted and qualified power. It is allowed to be exercised only upon the terms upon which it is granted. Hence, in order to improve a street in the city of East Portland, and legitimately charge the expense thereof upon the lots fronting and abutting upon it, the several duties before referred to must be strictly performed, and the conditions authorizing it exist.

It is claimed upon the part of the respondents in this case that the council of said city, in attempting to improve said L street, did not cause the recorder to give the proper notice of the intended improvement,—at least, he gave a notice that was insufficient; and the council acted upon it. The alleged defect in the notice is that it did not specify with convenient certainty the street, or part of street, proposed to be improved, and the kind of improvement to be made. The notice stated, in substance, that the council proposed to improve said street from a certain point to a certain point, by building an elevated roadway and sidewalks of full width from Water street eastward to the bank of earth elevation between Third and Fourth streets, and from the latter point eastward to Fifth street, by laying "where the same may be required" a plank roadway of full width, with sidewalks. The respondents' lots fronted and abutted

upon that part of said street between "the bank of earth elevation" referred to and said Fifth street; and they allege in their complaint that said L street had been once improved between points including said part of it, at the expense of the adjoining lots, by authority of the said council; and that it was in a good condition when the latter improvement was proposed, and that they were assured by the city authorities after said notice was published, and while they had the right to remonstrate against the proposed improvement, that the improvement of the part of the street affecting their lots would only consist in placing an occasional plank thereon, where the same was necessary; that the cost thereof would be trifling, and that that was the object of including in the written notice published the qualifying words referred to. I am of the opinion that the defect was fatal. It is very evident that a lot-owner, under the circumstances mentioned, might very easily be misled by such a notice. Knowing that the street upon which the lot fronted was in a reasonable condition of improvement, a lot-owner would have a right to believe, where the intention to improve was expressly declared to be by laying, *where the same may be required*, a plank roadway, etc., that it would only cost a trifling sum. The notice herein failed to express the kind of improvement to be made. Lot-owners who are compelled to pay the expenses of such a proceeding, or have their property sold to satisfy it, should be apprised of the character and extent of the improvement intended. That, evidently, is the object of requiring the notice, and it would not serve the purpose designed if left in uncertainty. The common council should have ascertained where the plank roadway would be required to be laid, and specified it in the notice before its publication. That would have enabled the owners of the lots affected thereby to have known how much money they would be likely to have to pay in order to defray the expense, and either to prepare for it or remonstrate against the improvement. Public officials ought to be considerate in regard to such affairs before they attempt to impose burdens upon others. A new, regular, and systematic improvement of a street may be gratifying to æsthetic people, but it often seriously embarrasses those who have to pay for it.

Another objection to the regularity of the proceeding is that the name of the owner of the lots in question was not entered in the docket of city liens, nor that the owner was unknown. It appears from the pleadings that no entry of the name of any owner was made in said docket, except, under the head of owner, in the statement was written "J. C. Hawthorne, Est. of." J. C. Hawthorne died long before said entry was made, and that fact was well known to all the officers of said city. The counsel for the appellants claims, however, that as the provisions of the charter allow the auditor to take the certificate of the county clerk for the county of Multnomah as to who is the owner of the property, and, as the records of the county showed that the owner of the lots was J. C. Hawthorne, and that at the date

of the ordinance declaring the assessment said Hawthorne was deceased, the charter was complied with. Said counsel also claims that real estate taxed in the name of a person other than the owner does not invalidate the assessment; that an assessment upon the estate of deceased persons may be held to be good; and that a mistake in that respect, not calculated to mislead, will not vitiate. I have examined the authorities referred to by the counsel to sustain the positions, but am of the opinion that none of them are directly in point. They are mostly adjudications that have been made under different statutes from that in question. I doubt very much whether any case can be found, where an act has provided in express terms that the assessment shall contain the name of the owner, or that the owner is unknown, that the requirement has been dispensed with. Such a case would be contrary to the general principle that underlies that character of the proceeding. The principle is well expressed in *Corporation of Washington v. Pratt*, 8 Wheat. 681. That case was a similar one to this. It was a suit to enjoin the corporation of the city of Washington from executing conveyances to purchasers under sales for the payment of taxes. It was there held that a sale of unimproved squares or lots in the city for the payment of taxes was illegal, unless such squares and lots had been assessed to the true and lawful proprietor thereof. The act of congress under which the assessment was attempted to be made, provided that the notice of sale for the non-payment of the tax should, among other things, state "the name of the person or persons to whom the same may have been assessed." The court construed those words to mean the actual owner of such lots; and in speaking of the question as to whether such sale would be illegal, merely because such squares and lots had not been assessed to the true and lawful proprietors thereof, without any willful mistake or willful neglect on the part of the person who made the assessment, the assessors having used due diligence to ascertain the true proprietors, it used the following language:

"This question, as well as every other in the cause, must find a solution in the provisions of the law which vests the power to sell. Where these are explicit and consistent, there is no ground for adjudication but their literal meaning. That they must be construed strictly, follows from their affecting private rights, and particularly rights of freehold; and that they must be pursued strictly, is the consequence of their being the sole foundation of the powers executed under them."

The reason could be expressed, perhaps, in fewer words still, by saying that the legislature that granted the power prescribed the condition upon which alone it could be exercised. To illustrate this more fully, I quote further from the language of the court in *Corporation of Washington v. Pratt*:

"It was undoubtedly in the power of congress to have left what latitude they pleased to the assessor in designating the owner; but if they have confined him to the necessity of determining the true owner, it is not in our power to enlarge his discretion. It may be a hardship upon the corporation,

but the legislature only can decide whether that hardship shall be perpetuated or not. It must be observed that the alternative is one which would put it in the power of the assessor to designate a mere nominal owner a kind of casual ejector in every case. Had congress intended to lighten the labors of the corporation or their assessor in this respect, there were very simple means of doing it. They might have sanctioned a designation with reference to the first or last vendee of record."

It seems to me that this principle cannot be shaken, and that the only thing to be determined in such a case is to ascertain what the legislature has said. As to the effect of a certificate of the county clerk for the county of Multnomah regarding the ownership of the property it is not necessary to consider. I do not understand that the auditor obtained any such certificate in this case, but if he did, and it was of the import suggested in the appellants' argument, it could not have aided the defense in the suit. A certificate of that character would not show who was the owner of the lots. It may have shown that J. C. Hawthorne had owned them in his life-time, and leave the inference that they then belonged to his heirs, but it would not have been any certificate of the ownership at the time, whatever effect a proper certificate of that character may have had. It is my opinion that an assessment for a street improvement, if otherwise regular, would be valid if the auditor took such certificate, stating who was the owner of the lot, and entered the name so certified in the docket of city liens, although it was not in fact the name of the owner; but in such case it would have to be the name of a person who could be such owner. A deceased person, of course, could not be an owner of property, and the insertion of such a name would necessarily be a nullity, from whatever source the auditor obtained it. A tax for street improvements is not against the person,—it is against the property; and to render it valid the act under which it is levied must be complied with in terms, and when that is done, no matter what those terms are, it becomes a legal charge upon the property. The name of the owner, or that the owner is unknown, is inserted in the docket because the statute requires it; and if the auditor inserts therein as owner the name of a person capable of owning real property, and which has been duly certified to him in accordance with the statute, the effect would be the same whether such person was the owner or not. Such certificate must state who is the owner thereof, and if it stated some person not *in esse* it would not be a compliance with the statute. Under the views here expressed, it necessarily follows that the name "J. C. Hawthorne, Est. of," entered as the name of the owner in the docket of city liens, was no compliance with the terms of the city charter upon the subject. The same determination was had in a number of cases cited by the respondents' counsel upon the argument.

Another objection urged against the legality of the improvement is that said L street had been improved in 1872, by authority of said

city, at the expense of the adjacent property. It is conceded upon the part of the appellants that the street was so improved, but is denied that it was a full improvement,—is claimed that it was but a partial improvement, and that it was therefore subject to be again improved. It appears from the pleadings and statements of counsel that on the eighth day of April, 1871, the city council passed an ordinance providing for the improvement of a part of said street, including that portion of it adjacent to and abutting upon the lots in question; that the improvement between Fourth and Fifth streets, as provided in said ordinance, consisted of grading the street to the established grade, and the laying of a plank roadway 16 feet wide and sidewalks and cross-walks and gutter; that the street is 60 feet wide, and the improvement as to the planking only extended over half the roadway; that it left on each side of the planking, and between it and the sidewalk, a space of eight feet, which was graded, but not planked. Upon this state of facts the court is called upon to determine whether the former improvement was a complete or partial one. But I do not understand that the question is of any importance whatever, in view of the provisions of other parts of the charter. Section 28 of article 6 of the charter authorizes the council to repair any street, or part thereof, whenever it deems expedient, and to declare by ordinance, before doing the same, whether the cost thereof shall be assessed upon the adjacent property, or paid out of the general fund of the city; and section 29, same article, provides that if the council declare that a proposed repair shall be made at the expense of the adjacent property thereafter, the proposed repair is to be deemed an improvement, and shall be made accordingly; but if the council declare that the cost of the same shall be paid out of the general fund, the repair may be made as the ordinance may provide, and be paid accordingly; and that whenever it becomes necessary to replace or rebuild any elevated roadway it shall be deemed an improvement. A part of these various provisions were in the original charter, and the other part has got in the charter by amendments. The result is the improvement of streets and repair of streets have become confounded. If the expense of the repair is to be charged upon the adjacent property, it is an improvement; the distinction, therefore, in such cases is only in name. The proceeding out of which this controversy has arisen may be termed either an "improvement" or "repair;" the test seems to be whether the expense is to be charged upon the adjacent lots. If the council should term an "improvement" a "repair," it would be immaterial, and I do not see why the work undertaken in regard to the improvement of L street, as shown in this case, could not have been termed a "repair" as well as an "improvement." When the council declared that it should be made at the cost of the adjacent property, it was then deemed an "improvement," and had to be made accordingly. Section 29, *supra*.

There are some other questions regarding the legality of the improvement in question, but they are not of a very serious character, nor is it necessary to determine them in this case.

The strong point in the defense made by the appellants' attorney is the delay upon the part of the respondents to commence the suit to enjoin the collection of the tax. That question addresses itself with great force to the equity side of the court. It is a fundamental principle of equity that a party who encourages an improvement of the character of the one in question to be made, and from which he derives a benefit, shall not be allowed thereafter to question its legality; that it will not afford him any remedy, under such circumstances. That doctrine is maintained by numerous authorities, but they all proceed upon the ground of an equitable estoppel. None of them go far enough to defeat the remedy of a party to have proceedings enjoined in such case upon the mere ground that the improvement has been beneficial to his property. They apply to cases where the party has, by some act, consented to the improvement resulting in the assessment. We cannot say in this case that the respondent gave her consent to the proceedings. She opposed them when she ascertained that a full improvement of the street was intended; and her failure to adopt some other remedy to avoid the enforcement of the assessment is not sufficient of itself to deprive her of the remedy invoked in the suit. I am conscious of the hardship imposed upon the tax-payers of a city in allowing parties to escape the payment of the part which they should in justice contribute, upon technical grounds, when they have received the benefit, but that can only be remedied by legislative provision. The courts are powerless to afford a remedy in such a case unless it comes within some acknowledged principle of jurisdiction. The decree appealed from must therefore be affirmed.

WALDO, C. J., concurs in the result; LORD, J., expresses no opinion.

(13 Or. 283)

PORTLAND LUMBERING & MANUF'G CO. v. SCHOOL-DISTRICT No. 1 OF  
MULTNOMAH CO.

Filed March 22, 1886.

## MECHANIC'S LIEN—PUBLIC PROPERTY EXEMPT.

On the ground of public policy, a mechanic's lien will not attach to a public building unless it appears by the law that such property was intended to be included in property subject to the operation of the lien law.<sup>1</sup>

*D. Goodsell*, for appellant.

*H. H. Northup*, for respondent.

LORD, J. This is a suit to foreclose a mechanic's lien, alleged to exist against the property of the defendant. A demurrer to the complaint was interposed, upon the ground that the facts stated were not sufficient to constitute a cause of suit. The court below sustained the demurrer, dismissed the complaint, and a decree was entered in accordance therewith, from which the plaintiff has appealed to this court. The point involved in this case, viz., that the mechanic's lien law is general, applying to all buildings alike, was considered by this court at its last term in the case of *Portland Lumbering & Manuf'g Co. v. City of Portland*, and determined adversely to the position of the plaintiff. The mode provided for the enforcement of a mechanic's lien is the sale, under execution, of the property against which the lien is asserted. But it is provided by another statute that all property owned by the state, or any county, incorporated city, town, or village therein, or of another public or municipal corporation of like character, shall be exempt from sale under execution. Here, then, there is a conflict, and it is clear that both of these laws cannot be enforced. What is the rule of law applicable to such a case? Mr. Philipps states it thus:

"Property which is exempt from execution, upon the grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanic's lien law, unless it appears by the law itself that property of this description was meant to be included; and to warrant this inference something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions." Phil. Mech. Liens, § 179.

To avoid the force of this objection it was contended that the language of the mechanic's lien law, in the use of the words "any building," was broad enough, and was intended to include this description of property. In *Board, etc., v. O'Conner*, 86 Ind. 536, the particular objection here urged was thus answered by the court:

"It is true that the statute of this state provides in terms for the acquisition and enforcement of a mechanic's lien upon and against 'any building;' but, broad and comprehensive as are the provisions of the statute, it must be construed in such manner as will not contravene settled principles of public policy."

<sup>1</sup>See note at end of case.

Upon this ground, a building which otherwise would be subject to a lien may be exempt, unless the statute, by express terms or necessary implication, includes such property.

In *Leonard v. City of Brooklyn*, 71 N. Y. 498, it was held by the court of appeals that, in the absence of an express statutory provision authorizing it, a mechanic's lien cannot be enforced against the real estate of a municipal corporation held for public use. The court said:

"If judgment in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly a judgment obtained under the lien law, which is the mere foreclosure of the notice which had been previously served and filed for work done for the benefit of the city, should stand in no better position. The act in question confers no special advantages, nor does it give a preference to a lien in any such case, and nothing is to be intended in favor of an enactment which interferes with a well-established principle, and changes a rule which has long been settled. To make such a material alteration, the law should be plain, explicit, and clear, and there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government, unless there is an express provision to that effect. The statute does not include such a case, either in terms or by necessary implication." *Darlington v. Mayor, etc.*, 31 N. Y. 164; *City of Chicago v. Hasley*, 25 Ill. 595; *Foster v. Fowler*, 60 Pa. St. 27; *Loring v. Small*, 50 Iowa, 271; *Bouton v. McDonough Co.*, 84 Ill. 384; *Wilson v. Huntingdon Co.*, 7 Watts & S. 197; *Ripley v. Gage Co.*, 3 Neb. 397; *Pike Co. v. Norrington*, 82 Ind. 190; *Lowe v. Board, etc.*, 94 Ind. 553; *Dunn v. North Missouri R. Co.*, 24 Mo. 493; *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465; *Poillon v. Mayor of New York*, 47 N. Y. 666.

To apply as a test the principle declared by these authorities to our mechanic's lien law, and the conclusion which we must reach has been thus expressed by Houck, J.:

"In the mechanic's lien law of this state, there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and, in the absence of such a provision, we must hold, in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use." *Board, etc., v. O'Conner, supra*.

This brings the case under consideration within the principle of the case decided at the last term, in which it was held, on the ground of public policy, that a mechanic's lien will not attach to a public building unless it appears by the law that such property was intended to be included. Nor are authorities wanting to show, under statutes of similar import, that this principle has been directly applied to school buildings erected for public school purposes. Mr. Philipps says: "Under an ordinary statute, a lien cannot be acquired for work done or material furnished towards the erection of a public school-house, erected in accordance with public law." Phil. Mech. Liens, § 179; citing *Brinckerhoff v. Board of Education*, 37 How. Pr. 520; *Williams v. Controllers, etc.*, 18 Pa. St. 275. And to these

may be added the further later authorities: *Board of Education v. Neidenberger*, 78 Ill. 58; *Thomas v. Board of Education*, 71 Ill. 283; *Quinn v. Allen*, 85 Ill. 39; *Charnock v. Colfax Tp.*, 51 Iowa, 70; *Falout v. School Com'rs*, 1 N. E. Rep. 389.

In support of the position that a lien can be enforced against such a building, the counsel for the plaintiff has cited two authorities: *Morse v. School-district No. 7 Newbery*, 3 Allen, 307, and *Shattell v. Woodward*, 17 Ind. 225. In reply to this it is sufficient to say that in the state in which the first case was decided there was no statute exempting such property from execution, (*Gaskill v. Dudley*, 6 Metc. 546;) and in the last, it has been overruled by a later authority already cited. From these views it follows that there was no error, and the decree must be affirmed.

## NOTE.

In *Wilkinson v. Hoffman*, (Wis.) 21 N. W. Rep. 816, it was held that Rev. St. Wis. 1878, § 3314, authorizing a mechanic's lien, did not extend to a building, or machinery placed in a building, constituting a part of the water-works of a city; and COLX. C. J., in delivering the opinion of the court, says: "It has never been understood that the statutes giving a mechanic's lien extended to or could be enforced against the building and real estate of a municipal corporation held for public use. The considerations founded on grounds of public policy and regard for the objects of municipal government forbid that this clause [Rev. St. § 3314] should be held to apply to machinery placed in a building constituting a part of the city water-works as strongly as to exempt the building itself. The public inconvenience which would result from having such machinery removed is too obvious and grave to require any discussion. The comfort, health, safety, and property of the citizens would be greatly endangered by allowing the facilities for procuring water to be suspended, even for a short period. In view of the serious consequences which would result by allowing the lien to machinery thus used, and which more than countervail any private advantage, we are inclined to hold that the provision does not apply in the case before us. True, the city has paid into court the price of the boilers; but suppose it had not done so, if the lien is given, they might be removed. Consequently, on grounds of public necessity and convenience, we must hold that the lien did not attach. The case stands upon the same ground as where material is furnished for a county court-house, jail, public school building, or other public buildings, which are held to be exempt from the operation of mechanic's lien laws."

A mechanic is not entitled to a lien upon a county court-house, for work done thereon, or material furnished therefor. *Whiting v. Story Co.*, (Iowa,) 6 N. W. Rep. 137.

In *Board, etc., Parke Co. v. O'Conner*, 86 Ind. 531, it is said, overruling *Shattell v. Woodward*, 17 Ind. 225, that there is no provision in the mechanic's lien law of Indiana "to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and in the absence of such a provision it must be held, in conformity with the weight of decision elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for public use." See, also, *Board, etc., Pike Co. v. Norrington*, 82 Ind. 190; *Lowe v. Board, etc.*, *Howard Co.*, 94 Ind. 553; and *Falout v. Board of School Com'rs*, (Ind.) 1 N. E. Rep. 389.

The principle laid down in the above cases is in accord with the law as decided in Pennsylvania, *Foster v. Fowler*, 60 Pa. St. 27; *Wilson v. Commissioners*, 7 Watts & S. 197; *Williams v. Controllers, etc.*, 18 Pa. St. 275; New York, *Brinckerhoff v. Board of Education*, 37 How. Pr. 520; *Poillon v. Mayor of New York*, 47 N. Y. 666; *Leonard v. City of Brooklyn*, 71 N. Y. 498; Iowa, *Charnock v. Colfax Tp.*, 51 Iowa, 70; *Loring v. Small*, 50 Iowa, 271; *Lewis v. Chickasaw Co.*, Id. 235; Illinois, *Board of Education v. Neidenberger*, 78 Ill. 58; *Bouton v. McDonough Co.*, 84 Ill. 396; and Missouri, *State v. Tiedermann*, 10 Fed. Rep. 20. See, also, *Frank v. Chosen Freeholders*, 39 N. J. Law, 347.

## SUPREME COURT OF NEVADA.

(19 Nev. 259)

ADAMS, Adm'r, etc., v. SMITH.

Filed March 30, 1886.

## COMPLAINT—RECOVERY BACK OF MONEY PAID—ALLEGATIONS—EVIDENCE.

If a man pays money in satisfaction of a claim, in order to recover it back he must allege facts justifying such recovery, and if the facts are denied he must prove them. If he relies upon deception and fraud, he must allege them. If he alleges simply that he paid a sum of money, and asks that he may recover it back without showing any good reason in law why it should be returned to him, he states no cause of action.

Response to petition for rehearing filed on behalf of plaintiff. The original opinion is reported in 9 Pac. Rep. 337.

M. C. Tilden and W. E. F. Deal, for plaintiff.

LEONARD, J. Although admitting that it is in the power of this court to modify a judgment upon grounds not taken by counsel, and that it is its duty to decide cases according to law, "no matter what may be the argument of counsel," it is asserted in the petition for a rehearing that "appellant did not advance or maintain the proposition in this court that he had the right to receive payment of the \$800 note without proving his claim against the estate as required by law." Although what we said upon this point was stated in answer to appellant's claim that the acts of U. Smith could not be ratified because they were unlawful, still counsel is mistaken. See appellant's brief, page 36, and his brief in reply, page 2; respondent's brief, pages 28, 32, 34.

It is also claimed that this question was not considered or discussed in the court below. The arguments of counsel are not before us, but the instructions given and refused are. By respondent's instructions the jury were told that appellant was never a creditor of said estate, and that they had no right to make any deduction from the amount of rents collected by U. Smith for or on account of any debt which Adams owed appellant; that if they found for plaintiff they must leave entirely out of consideration any debt due from Adams to appellant, as the plaintiff herself had no right to pay such debt; that they were only to determine—*First*, what sum, if any, U. Smith collected; *second*, what sum U. Smith paid for ground rents or other matters which respondent had the right to pay; and, *third*, if they found that U. Smith collected anything above such payments, it was their duty to find a verdict for respondent for such sums. Those instructions involved appellant's right to receive as well as respondent's right to pay. Besides, the court refused to instruct the jury that appellant was entitled to retain the amount of the \$800 note. It is true that appellant did not, so far as the record shows, except to the court's

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refusal to give his instructions, but the instruction just referred to shows appellant's theory in relation to respondent's right to recover the amount of the note.

The conclusion arrived at, that respondent could not recover the amount of the \$800 note, is attacked as unsound, because—*First*, it is inconsistent with the pleadings; *second*, because there was no proof that the note had not been paid, and the burden was upon appellant to show that fact; *third*, because the record does not show that respondent paid the note voluntarily, but that, on the contrary, it shows the power of attorney to collect rents, and apply them to such payment, was fraudulently obtained; that the statement on motion for a new trial does not specify that the verdict is not sustained by the evidence, for the reason that the amount due appellant should have been deducted from the rents collected; and that the result is the same as though no statement had been filed. Before respondent could recover the amount of rents collected and paid in satisfaction of the \$800 note, she was obliged to plead and prove facts entitling her to receive it back. The power of attorney, and the collection of rents thereunder to the extent of the indebtedness, amounted to payment of the note. The result was precisely the same as though she had taken the amount claimed from moneys belonging to the estate, and paid it to U. Smith in satisfaction of appellant's demand. The amended complaint, then, shows that she paid the claim. If, in a legal sense, the payment was voluntary, and especially if she did not act under a misapprehension of facts, and was not deceived by representations of U. Smith which were untrue, and which he had no right to make, and if the note was unpaid, then she could not recover to the extent of the sum due thereon. If a man pays money in satisfaction of a claim, in order to recover it back, he must allege facts justifying such recovery, and if the facts are denied, he must prove them. If he relies upon deception and fraud, he must allege them. If he relies upon prior payment, he must allege that. If he alleges simply that he paid a sum of money, and asks that he may recover it back, without showing any good reason in law why it should be returned to him, he states no cause of action.

Let us test the complaint in this case by these principles. It is alleged that respondent was induced to give the power of attorney by reason of appellant's pretension that he owned and held a note and mortgage of \$800 against the estate. Appellant had the right to make the pretension stated if it was true. But it is also alleged that "said pretended claim and demand was and is utterly false and fraudulent, but plaintiff, at the time she executed said instrument, in consequence of the representations of defendant, believed said claim and demand to be just and true." The allegation that "said claim and demand was utterly false and fraudulent" was only a conclusion of law arising from the fact of prior payment, if it had been made. If prior payment, and ignorance of the fact, had been al-

leged, a failure to deny would have been an admission entitling respondent to recover. But appellant was not required to deny the legal conclusion arising from facts not stated, and failure to deny was not an admission that his claim was false or fraudulent; that is to say, that it had been paid.

Much is said in the petition for rehearing about appellant's denial in his answer "that he ever pretended to own or hold any claim whatever against Adams or his estate at the time of his death, or at any other time." That denial was inserted upon the theory that U. Smith was not his agent in the premises, and that he was not responsible for anything done by U. Smith. It was not, nor was it intended to be, an admission that the \$800 note had been paid prior to the giving of the power of attorney. But in an amendment to his answer appellant alleges that, at the date of the note, his brother, U. Smith, had in his possession the sum of \$800 of appellant's money, which U. Smith loaned to Adams for and on behalf of, and as the money and property of, appellant, and took therefor a promissory note, and, as a chattel mortgage to secure the same, received an absolute assignment of a leasehold interest in property described; that no part of said \$800, or the interest thereon had ever been paid as provided in said promissory note and assignment; that on March 12, 1879, all the conditions, covenants, and agreements contained in said promissory note and assignment were broken, and said assignment became absolute, and the title to said leasehold interest vested absolutely in appellant. It is said that appellant's allegation touching the non-payment of the note was inserted for the purpose of asserting title in himself. That was probably his primary object, though it may not have been the only one. But, whatever the truth may be as to his reasons for alleging non-payment, the fact remains that he did allege it, and it shows, at least, that he did not intend to admit that the note had been paid, and consequently that the claim was false and fraudulent.

Appellant denied that any claim which he ever pretended to own or hold against Adams, or his estate, or respondent, or any claim or equity pretended by any one else to be held or owned by appellant against Adams or his estate, was in any manner false or fraudulent. If we admit that the criticisms of counsel for respondent concerning these denials are just, still the answer is that any denial was entirely gratuitous. None was required, for the reasons before stated, and the burden was still upon respondent to show herself entitled to recover the \$800 paid. It was not claimed that appellant's demand was false or fraudulent unless the note had been paid prior to the death of Adams. Respondent admitted that Adams received the \$800, and gave his note and mortgage. It was not claimed that anything had been paid since the death of Adams. There was not the slightest evidence tending to show payment, except from rents

collected under the power of attorney. The only evidence intended to prove payment otherwise was this, in respondent's testimony: "When I gave Smith the power of attorney, I supposed that the \$800 note was still unpaid, but I have since thought and now believe that the whole, or nearly the whole, of it was paid before my husband died." But not one fact did she state justifying her belief. On the contrary, it was in evidence that the note and mortgage were in the hands of U. Smith at the date of the power of attorney, subsequent to the death of Adams. They were in the same hands as late as March, 1882, at the time of the trial on appeal in the First district court. The note and mortgage were presented in court at that time, and there is no proof that any payment had been indorsed thereon. If payments appeared, the fact could have been shown. In an action upon a promissory note, failure to pay must be alleged; but, so far as proof is concerned, possession of the note is sufficient, *prima facie*, to sustain the allegation, (*Frisch v. Caler*, 21 Cal. 74;) and, although it was upon respondent to prove payment, yet the facts above stated showed, *prima facie*, that payment was not made prior to the death of Adams. And were we wrong in saying that, in a legal sense, respondent paid the note voluntarily? In the first place, the idea that the payment was not voluntary finds no support in the complaint. Of course, ignorance of the law on the part of respondent is no excuse, and the only thing charged against appellant is that respondent was induced to give the power of attorney, or pay the note, by the pretense that it had not been paid. Then, certainly, until she alleges that it was paid otherwise than from the rents, there is no allegation of a false inducement. The principal evidence upon this point was given by respondent herself. She said:

"I am acquainted with Dr. U. Smith. After my husband died U. Smith came to my house every day and wanted me to be appointed administratrix of my husband's estate. He told me that my husband was indebted to his brother, Cyrus Smith, in the sum of \$800, and that Cyrus Smith had a mortgage on the B-street house for that amount. After I was appointed administratrix, he urged me to give him a power of attorney to collect the rents from the B-street house, until he got money enough out of it to pay off his brother's claim, and then he said he would return it back to me, and I did give him the power of attorney to collect the rents."

He had a perfect right to do all that, and say what he did, if the note was unpaid. He did not have the right to retain the power of attorney and collect rents after the note had been satisfied; hence the judgment against appellant.

Respondent was then shown the power of attorney, and asked by her counsel: "What representation, if any, did U. Smith make to you to get the power of attorney? What did he say?" Appellant's objections to this question were overruled, and witness answered:

"He told me he was a good man; that he was a smart business man, and understood the law, and that he could not collect the rents very well from the

tenants; that he had no interest in the business except to collect the money for his brother, Cyrus, and that his brother was a wealthy man, and that when he got money enough out of the estate to pay off his brother's claim he would give it back to me. I believed what U. Smith told me. I had confidence in him, and, as I had my little children to take care of,—the youngest then was only about four months old,—I was glad to have him attend to the business. Mr. Tuska was my lawyer when I was appointed administratrix, and attended to that business for me; and Dr. U. Smith went to Mr. Tuska, and got him to write that power of attorney, and U. Smith sent it down to my house to me by my brother, with word that Mr. Tuska had drawn it, and that it was all right, and for me to sign it, and I did so. I signed it without reading it, because I supposed it was all right, and my brother took it back and gave it to Dr. U. Smith."

The power of attorney, given January 15, 1880, remained unrevoked until December 1, 1881, and in the revocation, respondent stated that she then annulled and made void the power of attorney made by her in writing and bearing date the fifteenth day of January, 1880, wherein she "did make, constitute, and appoint U. Smith her true and lawful attorney for the purpose and with the power therein set forth." Aside from the presumption that respondent knew the law, that is to say, that she had no right to pay the note except as provided by the statute, she did not state that she was in fact ignorant of the statutory provisions, or that U. Smith deceived her in this regard; but, on the contrary, she was "glad to have him attend to the business."

In our opinion we stated, in this connection, that "she acted according to the advice of her counsel in executing the power of attorney." We had reason to suppose this fact was conceded. It certainly was important. Counsel for appellant stated it in his brief, in this language:

"Plaintiff, in her complaint, seeks to excuse her own illegal act and contract, and to justify the bringing and maintenance of this action, by pleading her ignorance of the law, and want of legal advice. The proofs show that plaintiff acted advisedly, upon the advice of counsel, and with full knowledge of all the facts. No new fact has come to her knowledge since the execution of the power of attorney. But ignorance of the law or bad advice of counsel is no ground for relief against the consequences of her own illegal act and contract."

This statement, that respondent acted advisedly, upon the advice of counsel, is in no manner attempted to be denied by counsel for respondent in their lengthy and able brief, although their attention was called to the pages of the transcript sustaining it. But the evidence does show the fact to be as stated. Respondent testified: "Mr. Tuska was my lawyer when I was appointed administratrix, and attended to that business for me;" and U. Smith stated that "said power of attorney was written by Wal. J. Tuska, the acting attorney for said estate, on or about January 15, 1880." With this evidence only before us, it is preposterous to ask us to declare that Mr. Tuska was not the attorney of respondent, but was the attorney of U. Smith.

Finally, if it be conceded that appellant cannot avail himself of the fact that the verdict and judgment are not sustained by the evidence, for the reason that, in the statement, it is not specified that the amount due appellant should be deducted from the amount of rents collected, still he would be entitled to have that sum deducted from the judgment, or a new trial, by reason of the instructions of the court excepted to and specified in the assignments of error, wherein the jury were charged not to deduct from the rents any sum on account of any debt which Adams owed defendant. Rehearing denied.

SUPREME COURT OF ARIZONA.

(2 Ariz. 59)

TERRITORY v. DAVIS.

Filed March 18, 1886.

1. JURORS—QUALIFICATION OF.  
The opinion of a juror which does not seem to be founded on any evidence, and which is no more than a mere impression, based on rumor and newspaper statements, does not disqualify a juror.
2. CRIMINAL LAW—CONTINUANCE—REFUSAL TO GRANT, MAY BE GROUND FOR ERROR.  
Where a cause is tried, and the jury disagree, and defendant is put upon his trial again at the same term, to refuse a continuance asked for on the ground of the absence of a material witness who was present at the trial, and who, without defendant's knowledge or consent, went out of the territory, and could not be reached by subpoena, is error.
3. EVIDENCE—RES GESTÆ—DECLARATIONS OF DECEASED.  
Statements made by deceased two or three minutes after he was shot, and in presence of some of the eye-witnesses of the affair, as to how it occurred, are part of the *res gestæ*, and are admissible in evidence.
4. CRIMINAL LAW—INTOXICATING LIQUORS—EVIDENCE OF USE OF, WHEN ADMISSIBLE.  
It is competent to show that a defendant charged with murder had, by a long and continuous use of intoxicating liquors, weakened his mind to a state of insanity.
5. SAME—INSANITY.  
It is as competent to show a condition of insanity produced by excessive drinking as from any other cause.
6. SAME—DELIRIUM TREMENS.  
It is competent to show that the defendant so charged was, at the time, suffering from an attack of *mania a potu*.
7. SAME—TRIAL—REMARKS BY COURT.  
It is error for the trial judge, while competent testimony is being offered, to remark that such testimony is of no importance at all, and can effect nothing on behalf of defendant.
8. SAME—DRUNKENNESS.  
If a defendant so charged was laboring under the effects of former excessive drinking, to the extent of insanity, it need not appear that he was drunk at the time of the homicide.<sup>1</sup>
9. EVIDENCE—EXPERTS ON INSANITY.  
It is competent for any physician who knows the defendant to testify as to any injury he knows of, and to give his opinion as to the probable mental effect of the excessive use of intoxicating liquors by defendant, even though he may not have had especial experience with the insane.
10. WITNESS—CROSS-EXAMINATION.  
Where a defendant charged with crime voluntarily goes upon the witness stand as a general witness to the transaction, he may be cross-examined, as any other witness, and may be asked what he thought and intended at the time.

Appeal from Cochise county. The opinion sufficiently states the facts.

*Goodrich & Smith*, for appellant.

*Clark Churchill*, Atty. Gen., for appellee.

<sup>1</sup>See note at end of case.

SHIELDS, C. J. The defendant in this case, on the eighth day of June, 1885, at a session of the district court in and for the county of Cochise, was convicted of the crime of murder in the first degree, the jury affixing thereto the death penalty. He brings the case to this court, alleging various errors both in the admission and exclusion of testimony, and in the charge of the court. It is not deemed necessary to a disposition of the case to go into any very full or detailed statement of the testimony therein, or the facts as disclosed by the testimony. It is sufficient to say that on the seventeenth day of January, 1885, the defendant shot and killed one Matthew Alexander, in the town of Tombstone. The shooting occurred upon the street on the morning of the day last mentioned. The theory of the prosecution was that the killing was wholly without excuse or justification, and that the defendant was guilty of murder in the first degree. Upon the trial the defense was rested upon two grounds: *First*, that the killing was done in self-defense; *second*, that the defendant was in such a state of mind, produced by a continuous and excessive use of spirituous liquors, as not to be in a condition to know what he was doing or to be responsible for his acts. It is claimed that there are certain errors applicable to the case in general, and others bearing more directly upon the defense of insanity, that it is our duty to consider. Some of these it would be unnecessary to notice were it not that the case must go back for a new trial, and it is proper we should indicate our views on them.

The assignments of error, when grouped, present the following questions: *First*, were challenges to certain jurors by the accused improperly overruled? *Second*, was there an abuse of discretion on the part of the district court in declining and refusing to continue the cause? *Third*, should the testimony offered by the defendant, as to the effect upon his mind of his habits of intoxication, have been received. *Fourth*, was there error in the instructions given? These questions will be considered in their order.

1. As to the jurors. E. D. Waffle was called as a juror, and, questioned by the defendant's counsel, testified in substance that he was in Tombstone the day of the shooting, and heard of that fact, and that he had some opinion as to the guilt or innocence of the defendant; and, in reply to questions, he stated that the opinion he had was not a fixed or unalterable one; that, notwithstanding such opinion, he could sit on the jury and give the defendant a fair and impartial trial; that he would decide the cause upon the testimony given, and not upon his former opinion or impression; and, further, that the opinion which he had formed was one that would be changed by the testimony of witnesses upon the stand. We think the juror was entirely competent to sit in the case. The opinion of the juror did not seem to be founded on any evidence at all, and was nothing more than a mere impression based upon what he had heard in the street or read in the newspapers. Such an opinion can never be held to dis-

qualify a juror at the present day. *Staup v. Com.*, 74 Pa. St. 458; *Reynolds v. U. S.*, 98 U. S. 145. In this latter case the question is quite fully discussed, and the rule laid down, which we adopt as the law applicable to this territory upon this subject.

2. As to the error alleged in not continuing or postponing the trial upon the application of the defendant. The record discloses that the defendant was put upon his trial on the twenty-eighth day of May, 1885; that the jury disagreed; and that during the same term, and on the eighth day of June succeeding, he was placed upon trial again, in which trial a conviction was had. The defendant in due time filed an affidavit, setting forth the absence of a material witness, and set out at great length what he expected to prove by such witness. The affidavit in substance alleged that the witness was present at the first trial of the cause, and gave testimony therein; that, after he had so testified, he left the territory and went to New Mexico to attend to business there; that, immediately upon the court setting down the cause for trial the second time, the defendant procured a subpoena to be issued, and made every proper and possible exertion to secure the attendance of the absent witness, but that it was impossible to reach him, or to have him at the trial; and setting up the circumstances attending his departure, and the fact that the defendant would have him present at the next succeeding term of court. The affidavit then proceeds and sets out at considerable length the facts the defendant expected to prove and would prove by the absent witness; among others, that upon the night before the shooting the deceased came to the house where the defendant was stopping, and attempted to break into the house, and made threats against the defendant, among others, that he would take his life; and, further, that the defendant, from the excessive use of spirituous liquors, was mentally incapacitated and weakened to such a degree as not to fully understand or be responsible for his acts or conduct. It was made to appear that the trial court had informed counsel for defendant that the defendant would not be put upon trial again during the then present term, and also that one of the counsel for defendant who took an active and leading part in the first trial had become sick and confined to his bed at the time the case was set for trial the second time. These facts so shown we think entitled the defendant to a postponement of the trial, and the refusal of the trial court to continue the cause, under the circumstances, was such an abuse of discretion as authorizes this court to review the same and his action therein. The motion for a new trial, based on this refusal, should have been granted. We do not propose by this to interfere with the settled doctrine that the right and power to grant continuances is lodged with the trial judge, but this principle is subordinate to and controlled by that other principle that, where the trial judge has been guilty of an abuse of discretion in declining or refusing to postpone or continue a cause, this court, if satisfied of that fact, may review his action, and grant a new trial. *Churchill v.*

*Alpena Circuit Judge*, 54 Mich 100; S. C. 23 N. W. Rep. 211. Besides, the statute of this territory makes this refusal a ground of error in the supreme court. See Comp. Laws, p. 462, § 2785, par. 2, which provides in substance that an appeal may be taken to the supreme court from any order of the district court granting or refusing a new trial, or which affects a substantial right in an action or special proceeding.

3. The testimony shows that, shortly after the deceased was shot, and within two or three minutes thereafter, he was carried to a drug-store a few feet from where he was shot, and instantly made a statement to the effect that the defendant called to him to get down on his knees, and that on his refusal to do so the defendant shot him. This testimony was objected to as incompetent and hearsay, but admitted by the court. We think the testimony was clearly competent and admissible. It was clearly part of the *res gestæ* and admissible. *Hurd v. People*, 25 Mich. 405. In *Harriman v. Stowe*, 57 Mo. 93, it is held that where an accident happens, and the injured party declares to the physician, called soon after the accident, how it happened, such statement is admissible in evidence. In *Com. v. McPike*, 3 Cush. 181, it is held that, where a person immediately escaping from an assault declares who did it, such declaration may be received in evidence. So the declaration of the party assaulted, made immediately after the assault, showing the character of the impression made at the time on his mind in regard to the nature of the attack, is admissible. *Monday v. State*, 32 Ga. 672. In the present case the testimony shows that the statements proved were made to persons who were eye-witnesses of the transaction itself and the shooting, and within two or three minutes after the shot was fired. We think the statement clearly admissible.

4. The defendant alleges error with reference to the admission of testimony as to the effect upon his mind of the continuous use of intoxicating liquors. The defendant offered testimony tending to show that from a continuous use of ardent spirits his mind had become weakened, and that he was suffering, at the time, from an attack of *delirium tremens* or alcoholism. Both legal and medical writers recognize the fact that a continuous and excessive use of ardent liquors may result in such a state of insanity as to relieve from criminal responsibility for acts done while in a condition of mind produced and caused by such excessive drinking. It is very different from acts produced in a state of ordinary intoxication, and must be governed by wholly different rules and principles. The trials of causes, as reported, show that there is no species of insanity in which the mind is so completely filled with hallucinations as that produced by this means. In the case before us the defendant claims that certain proof offered by him bearing upon this point was improperly excluded. It is said by the attorney general, in reply to this, that although in the beginning the trial judge expressed the opinion that such proof was not

competent, that still the question was gone into fully by the witnesses for the defendant, who answered such questions as were put to them on that subject. We think from an examination of the record that this is so; but we find, further, that the whole effect of this testimony was destroyed by the remarks of the district judge throughout the trial, to the effect that such testimony was of no importance at all, and could effect nothing on behalf of the defendant, unless it could be shown that he was in an actual state of intoxication; in other words, that he was drunk at the time of the shooting. We are of opinion that this was an error equally as prejudicial to the rights of the defendant as if the judge had in the first instance excluded the testimony of the defendant bearing upon this point. There was no pretense that the defendant was actually drunk at the time of the shooting, nor was it necessary that there should be. The result of an examination of the criminal cases where this defense was made, as well as an examination of the medical authorities upon the subject, show that acts of violence on the part of the victim of this unfortunate habit of alcoholism are often committed while he is recovering from his debauch. We do not, however, intimate that the facts in this case were such as to show the defendant in that condition of mind as not to be responsible for his acts, but we think he was clearly entitled to have all the facts and circumstances bearing upon his condition of mind fairly submitted to the jury, who must, under all these facts and circumstances, determine whether or not he was responsible for what he did. This sort of testimony was for the consideration of the jury, and with a view of enabling them to determine the condition of the mind of the defendant at the time he fired the shot. Was he, at such time, by reason of his previous habits of intoxication, rendered incapable of forming the intention, or of exercising the deliberation and premeditation, which are essential to the existence of murder in the first degree, of which the defendant was convicted? Or, upon the contrary, was his mind so broken down and destroyed as to render him incapable of forming such an intention? It was important to determine these questions, for only by so doing could the jury come to the conclusion that the offense was murder of the first or second degree or manslaughter. It was defendant's right, therefore, to have all of this testimony so offered given freely and fairly to the jury, so that from it they could pass upon the degree of the guilt of the defendant.

The defendant put upon the stand Dr. Dunn, a physician, in active practice in Tombstone, and offered to show by him an injury or depression of the skull or brain of the defendant, and the probable effect of the continuous use of strong drink upon the defendant, in view of such depression or injury. The district judge excluded this testimony, upon the ground that the physician was not shown to have had experience in the treatment or care of insane persons, and was not an expert on the subject of insanity. We think this was error. It was

perfectly competent to show by this physician the injuries offered to be proven, and what effect, in his judgment as a physician, in view of such a condition of the head and skull as described by him, the use of spirituous liquors would have upon the defendant. To entitle him to give this testimony it was not necessary that the physician should have come from an asylum, or had the care of insane patients. His position as a physician entitled him to give his experience and judgment on the matters and questions that were submitted to him.

5. Certain errors are alleged with reference to the cross-examination of the defendant, who went on the stand as a general witness on his own behalf. When upon the stand, he was cross-examined as to what he *thought* and *intended* to do at the time that he fired the shot. This was clearly proper cross-examination. No question seems to have been asked beyond those indicated, and certainly the defendant could not complain so long as the questions were confined to that limit. The defendant went on the stand as a general witness in his own behalf, and testified fully as to the shooting, as well as to the circumstances occurring the night before. In view of such fact, the cross-examination might very properly have been extended beyond the point where it did actually stop, had the prosecution seen fit to pursue it further. *Stover v. State*, 56 N. Y. 315; *People v. Reinhart*, 39 Cal. 449; *People v. Russell*, 46 Cal. 121; *Com. v. Price*, 10 Gray, 472; *People v. Beck*, 58 Cal. 212. These California cases were under a statute which required the cross-examination to be confined to matters about which the prisoner was examined in chief. In our statute on the subject there is no such limitation. Comp. Laws, p. 101, § 408. This rule does not violate the principle that a person accused of crime shall not be compelled to testify against himself; but this is a privilege which a defendant upon trial may waive, and when he does so, and goes upon the stand as a general witness in his own behalf, he may be examined and cross-examined, as any other witness. In such case he voluntarily assumes the character of a witness, and cannot interpose his privilege, and refuse to answer such questions as are put to him in a legitimate cross-examination, and *this* must be determined by the same rules applicable to the cross-examination of other witnesses.

This disposes of all the questions raised on the trial except those alleging error in the instructions given. We do not deem it necessary, however, to consider this branch of the case.

The sentence and judgment of the court below are reversed, and a new trial granted.

#### NOTE.

Drunkenness is no excuse for crime. *Cross v. State*, (Wis.) 12 N. W. Rep. 425; *U. S. v. Claypool*, 14 Fed. Rep. 127.

Drunkenness, voluntarily brought on, is, of itself, no excuse for crime. *People v. Blake*, (Cal.) 4 Pac. Rep. 1. See, also, *Cook v. Territory*, (Wyo.) 4 Pac. Rep. 887.

It may be said to be the universal rule that simple intoxication is no excuse for crime. See *Tidwell v. State*, 70 Ala. 33; *State v. Bullock*, 13 Ala. 413; *Friery v. People*, 54 Barb. 319; *People v. Robinson*, 1 Parker, Crim. R. 649; *State v. Thompson*, 12 Nev.

140; Shannahan v. Com., 8 Bush, 464; State v. Turner, Wright, (Ohio,) 20; Boswell v. Com., 20 Grat. 860; State v. Mullen, 14 La. Ann. 570; Rafferty v. People, 66 Ill. 118; McKenzie v. State, 26 Ark. 335; People v. Williams, 43 Cal. 344; State v. Hurley, 1 Houst. Crim. Cas. 28; Mercer v. State, 17 Ga. 146; Shannahan v. Com., 8 Bush, 463; Schaller v. State, 14 Mo. 502; State v. Harlow, 21 Mo. 446; Kelly v. State, 3 Smedes & M. 518; Kenny v. People, 31 N. Y. 330; O'Brien v. People, 48 Barb. 274; People v. Rogers, 18 N. Y. 9; People v. Garbutt, 17 Mich. 9; Golden v. State, 25 Ga. 527; Com. v. Hart, 2 Brewst. 546; Com. v. Dougherty, 1 Browne, 20; Com. v. Hawkins, 3 Gray, 463; State v. Bowen, 1 Houst. Crim. Cas. 91; People v. Fuller, 2 Parker, Crim. R. 16; Marshall v. State, 59 Ga. 154; Estes v. State, 55 Ga. 30; People v. Willey, 2 Parker, Crim. R. 19; People v. Porter, Id. 14; Choice v. State, 31 Ga. 424; State v. Keath, 83 N. C. 626; U. S. v. Forbes, Crabbe, 559; Respublica v. Weidle, 2 Dall. 88; U. S. v. McGlue, 1 Curt. 1; U. S. v. Drew, 5 Mason, 28; State v. McCants, 1 Speer, 393; Cornwell v. State, Mart. & Y. 147; Reg. v. Cruise, 3 Car. & P. 546; Rex v. Grindley, 7 Car. & P. 145; Rex v. Meakin, Id. 297; Burrow's Case, Lew. Cr. Cas. 75; Reniger v. Fogossa, Flowd. 19; 1 Russ. Cr. 12; 2 Bl. Comm. 25; Coke, Comm. 274a.

Intoxication is no defense to a prosecution for crime; but in some cases evidence of intoxication is admissible to show that no crime has been committed, or to show the degree or grade of the crime. Cline v. State, (Ohio,) 1 N. E. Rep. 22.

Drunkenness is no excuse for crime, and in the instances in which it is resorted to to blunt moral responsibility it heightens the culpability of the offender. U. S. v. Claypool, 14 Fed. Rep. 127.

The old English writers lay it down that drunkenness is always an aggravation of the crime, and it has been said that there are expressions in some of the cases in the United States to the same effect. See Com. v. Hart, 2 Brewst. 546; U. S. v. Forbes, Crabbe, 559. But this has been disputed by later authorities, McIntyre v. People, 38 Ill. 515; Ferrell v. State, 43 Tex. 503, and is not now looked upon as the law in this country.

It is said in a recent case that where a person, having the desire to do another an unlawful injury, drinks intoxicating liquors to nerve himself up to the commission of the crime, that the intoxication is held to aggravate the offense; but that the rule that intoxication aggravates crime is confined to this class of cases. Cline v. State, (Ohio,) 1 N. E. Rep. 22.

Where the prisoner, at the time of the commission of the alleged offense, is so frenzied from the excessive use of liquor that he was incapable of knowing what he was doing, this fact will be a defense to a prosecution therefor. Cross v. State, (Wis.) 12 N. W. Rep. 425.

Voluntary intoxication is no excuse for crime; but on the trial of one charged with murder in the first degree his intoxication may be taken by the jury as a circumstance to show that the act of killing was not deliberate and premeditated. Schlenker v. State, (Neb.) 1 N. W. Rep. 857.

Insanity produced by protracted overindulgence in intoxicating liquors may be said not to be an excuse for crime, but a defense in prosecution therefor. People v. Blake, (Cal.) 4 Pac. Rep. 1. See, also, Fisher v. State, 64 Ind. 435; Bradley v. State, 31 Ind. 492; Cluck v. State, 40 Ind. 263; Carter v. State, 12 Tex. 500; Beasley v. State, 50 Ala. 149; O'Brien v. People, 48 Barb. 274; Erwin v. State, 10 Tex. App. 700; State v. Dillahunst, 3 Har. (Del.) 551; State v. Hurley, 1 Houst. Crim. Cas. 28; State v. Till, Id. 233; Macconnehey v. State, 5 Ohio St. 77; U. S. v. Clarke, 2 Cranch, C. C. 158; Gollither v. Com., 2 Duv. 163; State v. McGonigal, 5 Har. (Del.) 510; Real v. People, 42 N. Y. 270; Schlenker v. State, 9 Neb. 241; S. C. 1 N. W. Rep. 857; Bailey v. State, 26 Ind. 422; Boswell's Case, 20 Grat. 860; U. S. v. Drew, 5 Mason, 28; Rennie's Case, Lew. 76; Reg. v. Dixon, 11 Cox, 341; Reg. v. Leigh, 4 Post. & F. 915.

It cannot be said as a rule of law that, because a man is a drunkard, he is of unsound mind. Estate of Lang, (Cal.) 2 Pac. Rep. 491.

Where irresponsible drunkenness is relied on as a defense to a prosecution for crime, the burden of proving such drunkenness is on the defendant, and he must establish it beyond a reasonable doubt. The contrary rule commented on and disapproved. State v. Grear, (Minn.) 13 N. W. Rep. 140.

In some cases evidence of intoxication is admissible to show that no crime has been committed, or to fix the grade of the crime. When the offense charged embraces deliberation, premeditation, some specific intent, or the like, evidence of intoxication at the time the deed was done may be important. Cline v. State, (Ohio,) 1 N. E. Rep. 22.

Evidence of drunkenness is admissible on the question of intent, when the intent is an element in the constitution of the offense, and without which the offense could not be committed; and if the accused was in such a condition of mind from intoxication as to be incapable of forming such intent, it will be a complete defense. People v. Blake, (Cal.) 4 Pac. Rep. 1; Cook v. Territory, (Wyo.) Id. 887.

In a prosecution for maliciously shooting with intent to wound, evidence that the defendant was so much intoxicated that he could not form or have such intent is admissible. Cline v. State, (Ohio,) 1 N. E. Rep. 22.

Where the defendant was so drunk that he was incapable of forming an intent to ravish the prosecutrix, such drunkenness is a defense to a prosecution for attempted rape. *State v. Donovan*, (Iowa,) 16 N. W. Rep. 206.

It is said that intoxication or drunkenness on the part of the defendant cannot, in a murder trial, form a legitimate matter of inquiry as between the crime of murder in the second degree and that of manslaughter; for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation. *People v. Langton*, 7 Pac. Rep. 843. The court say in this case that the question is not a new one to the court, but that it was passed upon and the same doctrine held in the case of *People v. Nichol*, 34 Cal. 215, and add: "In the case of *Pirtle v. State*, 9 Humph. 663, the supreme court of Tennessee say that, as between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry."

The supreme court of Minnesota say, in case of *State v. Grear*, 13 N. W. Rep. 140, that "upon the subject of intoxication as a defense to a criminal charge the court instructed the jury to the effect that if the defendant was at the time of the shooting in such a condition of mind by reason of intoxication that he did not know what he was doing, or whether his acts were right or wrong, then he is irresponsible, and incapable of entertaining a criminal intent, and must be acquitted. We are by no means prepared to concede the correctness of the general rule thus laid down with respect to the effect of voluntary drunkenness in relieving of criminal responsibility. Certainly no such rule prevailed at common law. See *Com. v. Hawkins*, 3 Gray, 463; *People v. Rogers*, 18 N. Y. 9; *Hopt v. People*, 104 U. S. 631. It is at the same time true that there may be a degree of intoxication which will render a person incapable of entertaining the actual specific intent to do a certain thing which is by statute made a necessary ingredient of certain offenses. *State v. Garvey*, 11 Minn. 154, (Gil. 95.) So, also, it may be material for the prisoner to show intoxication where the charge is of murder, and there are different degrees of that crime, according to defendant's state of mind at the time the offense was committed."

In a recent Ohio case, *Cline v. State*, 1 N. E. Rep. 22, the late Judge OKEY, one of the most learned and able judges that ever sat upon the Ohio or any other bench, says that "where the offense charged embraces deliberation, premeditation, some specific intent, or the like, evidence of intoxication may be important, and it has frequently been admitted. *Pigman v. State*, 14 Ohio, 555; *Nichols v. State*, 8 Ohio St. 435; *Davis v. State*, 25 Ohio St. 369; *Lytle v. State*, 31 Ohio St. 196. The leading case of *Pignan v. State* has been repeatedly cited with approval. *People v. Robinson*, 2 Parker, Crim. R. 235; *People v. Harris*, 29 Cal. 678; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22; *Hopt v. People*, 104 U. S. 631; *State v. Johnson*, 40 Conn. 136; and no doubt the law upon the subject is correctly stated in that case, and that the rule as there expressed is humane and just; but there is always danger that undue weight will be attached to the fact of drunkenness, where it is shown in a criminal case, and courts and juries should see that it is only used for the purpose above stated, and not as a cloak or justification for crime."

This may be said to be the prevailing rule of law throughout the country. See U. S. v. Drew, 5 Mason, 28; S. C. 1 Lead. Crim. Cas. (2d Ed.) 131, note; *Regina v. Davis*, 14 Cox, Crim. Cas. 563; S. C. 28 Moak, 657, note; *Swan v. State*, 4 Humph. 136; *Pirtle v. State*, 9 Humph. 663; *Haile v. State*, 11 Humph. 156; *Cartwright v. State*, 8 Lea, 376; *Lancaster v. State*, 2 Lea, 576; *State v. Johnson*, 40 Conn. 136; *State v. Johnson*, 41 Conn. 585; *Jones v. State*, 29 Ga. 594; *Hopt v. People*, 104 U. S. 631; *People v. Lewis*, 36 Cal. 531; *People v. Nichol*, 34 Cal. 212; *People v. King*, 27 Cal. 507; *People v. Williams*, 43 Cal. 344; *People v. Belencia*, 21 Cal. 544; *Curry v. Com.*, 2 Bush, 67; *Kelly v. Com.*, 1 Grant, Cas. 484; *Keenan v. Com.*, 44 Pa. St. 55; *Jones v. Com.*, 75 Pa. St. 403; *Colbath v. State*, 2 Tex. App. 391; *People v. Odell*, 1 Dak. 197; *Lanergan v. People*, 6 Parker, 209; *People v. Batting*, 49 How. Pr. 392; *State v. Edwards*, 71 Mo. 324; *State v. Harlow*, 21 Mo. 446; *State v. Cross*, 27 Mo. 332; *State v. Hundley*, 46 Mo. 416; *State v. Dearing*, 65 Mo. 530; *State v. Tatro*, 50 Vt. 483; *Wood v. State*, 34 Ark. 341; *State v. Bell*, 29 Iowa, 316; *Scott v. State*, 12 Tex. App. 31; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22; *People v. Harris*, 29 Cal. 678; *State v. Maxwell*, 42 Iowa, 208; *Wenz v. State*, 1 Tex. App. 36; *Loza v. State*, Id. 488; U. S. v. Bowen, 4 Cranch, C. C. 604; *State v. Schingen*, 20 Wis. 74; *State v. Coleman*, 27 La. Ann. 691; *State v. Trivas*, 32 La. Ann. 1086; *Henslie v. State*, 3 Heisk. 202; *State v. Garvey*, 11 Minn. 154, (Gil. 95.)

(2 Ariz. 69)

**TERRITORY v. NELIGH and another.**

Filed March 18, 1886.

**1. CRIMINAL LAW—BILL OF EXCEPTIONS.**

A transcript of the notes of a stenographer, certified by him to be the testimony in a cause, cannot have the effect of a bill of exceptions.

**2. SAME—APPEAL—RECORD.**

The certificate of the clerk must show that the transcript is the record of the action, and it is not sufficient for him to certify to portions of the record.

**3. SAME—TRIAL—INSTRUCTIONS MUST BE BASED UPON THE EVIDENCE.**

It is impossible for the court to pass upon an instruction unless the evidence to which it is applicable be before the court.

**4. SAME—ACCOMPLICE.**

The uncorroborated testimony of an accomplice is not sufficient to sustain a conviction.

Appeal from district court, Graham county.

The opinion states the facts.

*Clark Churchill*, Atty. Gen., for the Territory.

*P. J. Bolan* and *B. H. Herreford*, for appellants.

**PER CURIAM.** The defendants were convicted of the crime of grand larceny, at a session of the district court in and for the county of Graham, on the thirteenth day of September, A. D. 1884. They now bring error, and ask a review by this court of the proceedings upon such trial.

The case is in no shape to present any of the questions, if we saw fit to rule upon them. There is no bill of exceptions at all, but simply a mass of papers which are stated by the stenographer of the court to be the testimony in the cause. Such papers, it is needless to say, cannot have the effect of a bill of exceptions. The papers presented to us are defective in other respects. The certificate of the clerk does not show that the record of the action is sent up, but only such portions thereof as are mentioned by him in his certificate. Of course, such papers could not have the effect of a bill of exceptions. We have, however, looked through this mass of testimony returned, and have satisfied ourselves that the defendants had a fair and impartial trial, and that no exceptions to rulings were taken that have any merit to them at all, or that in the slightest degree prejudiced the rights of the defendants.

Two instructions were given, which, it is insisted, were wrong, and the giving of them was such error as should work a reversal of the conviction. These were as follows:

(1) "The jury are further instructed that when a witness swears to a certain fact, at a certain time, and afterwards swears differently at another time, his whole evidence must be looked upon with suspicion."

(2) "The jury are instructed if they believe from the evidence that the witness Sloan was an accomplice, then he must be corroborated by other evidence."

As to the first request, it is not necessary to say whether it is good or bad law. The testimony is not here so that we could see, so we

are unable to say whether it was warranted by the testimony or not. In the second place, the instructions as actually given are not before us, so that we do not know but that the request was substantially given in the general instructions of the court.

As to the second request, we do not think it is in such form as to reach the point aimed at by counsel, which undoubtedly was that the jury should not find the defendants guilty from the uncorroborated testimony of an accomplice. This states the law of this territory correctly. It could do no harm, however, as we fail to see anything in the testimony that is sent up here that would indicate that Sloan is an accomplice. We have looked through this mass of testimony before us, and there is nothing in it to indicate that Sloan was in any manner or in any form an accomplice. He testified to seeing the defendants killing the cattle, and that is all upon which the request could have been based.

It is not necessary to consider the cause further. The conviction below will be affirmed.

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(2 Ariz. 68)

**TERRITORY v. RICHMOND.**

Filed March 18, 1886.

**RAPE—EVIDENCE—REPUTATION FOR CHASTITY.**

In an indictment for rape, where the evidence shows that the prosecuting witness is a girl of 13 years of age, who lives alone with her mother, it is not error to refuse to permit evidence that the house in which they lived was of bad repute for chastity.

Appeal from Graham county.

*Clark Churchill*, Atty. Gen., for appellee.

*Mr. Thomond*, for appellant.

**PER CURIAM.** This was an indictment charging Jerry Richmond with the crime of rape upon the person of Minnie Eichler. The cause was tried in Graham county, and he was found guilty, and sentenced to a term of five years in the territorial prison. We have examined the evidence in the case, and are of the opinion that the evidence sustains the conviction. It is urged that the court erred in not permitting evidence to go to the jury on behalf of defendant that the house in which she lived was a house of bad repute for chastity. The record shows that she was 13 years old; that she lived with her mother; and that no other person occupied the house with them. In such a case, the general reputation of the house was not material. No other error is pointed out.

The judgment is affirmed.

## SUPREME COURT OF CALIFORNIA.

(69 Cal. 133)

PFISTER and others v. WADE and others. (Nos. 8,863, 9,022.)

Filed March 23, 1886.

## 1. PLEADING—COMPLAINT WITH SEVERAL COUNTS—DEMURRER.

Where a general demurrer is taken to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action, such demurrer should be overruled if any of the counts are sufficient.<sup>1</sup>

## 2. SAME—JOINDER OF PARTIES AND CAUSES OF ACTION.

Joinder of defendants and causes of action are proper, where the same arise out of a transaction in which all the defendants are directly interested, and relate to a sum of money claimed by each.

## 3. SAME—COPARTNERSHIP, AVERMENT OF.

A copartnership is properly averred in a complaint which states that "for several years last past the plaintiffs have been and now are copartners, doing business under the firm name of A. P. & Co.;" and if the date of the formation of the partnership is not sufficiently specific, this should have been remedied by motion to have the proper date inserted.

## 4. EVIDENCE—EFFECT OF PLEADINGS AS EVIDENCE.

A party ordinarily is only bound by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded; yet the original pleadings may be admitted as evidence of some independent fact connected with the case; as, in a case where the original pleading contained an offer to pay the money in dispute into court, the same is admissible as evidence of such offer, in connection with evidence that the money was so paid.

## 5. APPEAL—REVERSAL OF JUDGMENT—RETRIAL.

If, on appeal, a judgment is reversed, and is thereupon vacated and set aside on motion, the party procuring the same to be done, cannot object to the right of another party, who had not appealed, to participate in the new trial.

## 6. ATTORNEY—POWER TO CONFESS JUDGMENT.

Unless an attorney has express power from his client so to do, he cannot consent to a judgment by confession.

## 7. PAYMENT OF MONEY INTO COURT—RIGHT OF DEFENDANT TO INTEREST.

A defendant is entitled to interest on an award to him of money which is a portion of a sum paid into court by a plaintiff, to be distributed between two adverse claimants as the court may determine, if defendant was delayed in receiving it by reason of the improper or defective proceedings of the plaintiff.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

*M. Lynch*, for appellant James Judson in No. 8,863.

*Burt & Pfister, J. R. Lowe, John Reynolds, and C. D. Wright*, for respondent.

*Burt & Pfister*, for plaintiffs and appellants in No. 9,022.

*C. D. Wright, J. R. Lowe, and M. Lynch*, for respondents.

SEARLS, C. In September, 1874, one Trenouth began storing wheat with defendant Wade, and in March, 1875, had so stored 128,438 pounds. Between September 19, 1874, and April 24, 1875,

<sup>1</sup> See note at end of case.

Trenouth borrowed from Wade, on the security of the wheat, several sums of money, which amounted in the aggregate, with the sum due for storage, to \$1,950, exclusive of interest. Upon the first of January, 1878, Trenouth sold the wheat to the plaintiffs, who, it was agreed by all the parties, should pay Wade the amount due him out of the funds arising from the sale of the wheat. After this arrangement was made, Wade delivered the wheat to plaintiffs. Trenouth was indebted to one Bliss, and on the tenth day of January, 1878, assigned to him his claim against plaintiffs arising out of the sale of the wheat, of which fact plaintiffs were notified. On the sixth of January, 1878, the parties had met and agreed that there was then due to Wade \$2,640, and it was estimated there would be a balance due to Trenouth of \$200 to \$300, which plaintiffs agreed to pay as soon as the wheat was all delivered and the transaction closed. After delivering all of the wheat, Wade demanded payment from plaintiffs, to which they objected on the ground that Bliss, the assignee of Trenouth, demanded the entire proceeds of the sale. Wade threatened suit against plaintiffs, whereupon the latter filed a bill in the district court, and procured an injunction restraining both Wade and Bliss from suing them on the claim. A decree was entered, allowing the plaintiffs Pfister & Co. to pay the money into court, and requiring Wade and Bliss to interplead, and, by an action between themselves, determine their respective rights to the money. Plaintiffs paid the amount (\$2,889.88) into court, where it still remains.

Defendant Bliss appealed to this court, and the judgment of the court below was reversed. 56 Cal. 43. The cause again came up on appeal from an order denying a motion to dissolve the injunction, and is reported in 59 Cal. 273. Prior to the last trial the pleadings were amended, and a cross-complaint was filed by defendant Bliss, in which he sought to recover the full sum of \$2,889.88, with interest thereon from January 1, 1878.

The cause came on for trial March 30, 1882, when, it appearing that defendant Bliss had assigned his interest in the subject-matter of the action to James Judson, the latter was, on motion, substituted as defendant in place of said Bliss. The cause was tried by the court, without a jury, and judgment entered in favor of defendant Wade for \$3,470.33 against the plaintiffs, and in favor of the defendant James Judson and against the plaintiffs for \$269.27, etc. Defendant Judson appeals from the judgment, and from an order denying the motion for a new trial. The plaintiffs also appeal from the judgment, and, by stipulation, their appeal, (No. 9,022,) is based upon the transcript in this case, and for convenience sake we shall consider the appeals together.

The second amended complaint consisted of four several counts. A demurrer was interposed to the whole; and as some of the counts were unquestionably sufficient, the demurrer was properly overruled, so far as the general objection that it did not state facts sufficient to

constitute a cause of action was concerned. There was not a misjoinder of parties defendant or of causes of action. The whole transaction grew out of a state of things in which both the parties defendant were directly interested, and related to a sum of money claimed by both. The complaint averred that said plaintiffs, for several years last past, have been and are now copartners, doing business under the firm name and style of A. Pfister & Co., etc. This was sufficient as an averment of copartnership. If not sufficiently specific as to the time of its formation, the court would doubtless, on motion, have required the proper date to be inserted. A complaint may well contain all the essential averments to a good pleading, and yet state them in a form too general to enable the defendant to meet them by a specific technical defense. Such an objection should be met, not by a demurrer, but by a motion to make the pleading more specific. Had the demurrer been improperly overruled for this cause, the error would have been cured by the cross-complaint of defendant, which sets out the partnership of plaintiffs. There was no error in overruling the demurrer.

The motion of the defendant for judgment on the pleadings was properly overruled for two reasons: *First*. The answer of plaintiffs to the cross-complaint of Bliss, in effect, denies the allegations, or, what is the same thing, states other facts inconsistent therewith, and which, if true, would defeat defendant's right to recover on his cross-complaint. *Second*. While the pleading of defendant Bliss is denominated an "answer, counter-claim, and cross-complaint," yet most of its allegations are, properly speaking, of a character to be treated as constituting a defense of counter-claim, and as such are to be taken as denied.

Objection was made at the trial to the testimony of defendant Wade upon the ground that he was not a party to the suit, and therefore his testimony was irrelevant and immaterial to any issue before the court. Wade was a party to the transaction, and to the suit, and was called by plaintiffs as a witness to prove, and did testify to, matters of vital importance in the determination of the case. The contract for the sale of the wheat to plaintiffs by Trenouth was in writing, dated December 31, 1877. The agreement of plaintiffs to recognize the lien of Wade on the wheat, and to pay the amount due him, and to which Trenouth assented, was an entirely different contract, made between different parties, at a different time, and in relation to a different matter. It was a verbal agreement, and the testimony in relation to it was properly admitted. Plaintiffs' Exhibit B was not, as was said by the court, a contract, but a memorandum or receipt, showing the quantity of wheat delivered.

Plaintiffs, in their second amended complaint, averred that they were, and always had been, ready and willing to pay over to the parties entitled thereto the amount due upon the wheat, and offered to pay the money into court. At the trial plaintiffs, for the purpose of

showing their offer to fulfill the contract by paying the money into court, offered in evidence the original complaint filed January 25, 1878, which contained such offer, and which for that purpose was admitted. There can be no question but that an amended complaint takes the place of the original, and that, when filed, the original ceases to perform any further functions as a pleading. *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKibben*, 54 Cal. 192. And although a party is bound by the admissions in his pleading, yet it is only by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded, that he is bound. *Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222; *Kentfield v. Hayes*, 57 Cal. 409.

It would work rank injustice to hold a party bound by statements or admissions in a pleading, which had been amended, for the very reason that they were inserted by inadvertence or mistake, and yet the rule which would admit it in evidence would have just this effect. To permit it to be introduced generally as evidence in favor of the party by whom it was filed would be to permit a party to manufacture testimony in his own behalf. While the general rule excludes all pleadings which have been superseded by others, it does not follow that an original pleading thus superseded may not be admissible in evidence in support of some independent fact connected with the case. Whenever the date at which a pleading was filed becomes important, it may be introduced as evidence of that fact, although a later pleading has taken its place. So, too, if a pleading contains a copy of an instrument, the original of which is afterwards lost, the fact that it is embodied in a pleading, and the further fact that such pleading has been superseded by another, does not prevent the copy from being introduced in evidence, upon proof of its authenticity, just as though it was a separate instrument. In other words, it is, in a proper case, admissible in evidence, not because it is found in the pleading, but as a fact proper to be admitted.

In the present case, had the plaintiffs served a written notice of their offer to pay the money into court upon defendant Bliss, the notice would have been proper evidence, and the circumstance of the offer having been contained in the pleading did not alter its admissibility. This was followed by proof that the money was actually paid into court, and that it still remains there, subject to the final disposition of the case. Under the pleading, we are of opinion all this evidence was proper.

It is contended by appellant Judson that as Wade never appealed from the original judgment entered in this cause, the reversal thereof did not apply to him, and, as a consequence, that he had no right to participate in the last trial. The answer to the position is that this court reversed the judgment of the court below, and that thereupon, on motion of counsel for Bliss, the assignor of Judson, the judgment in the court below was *vacated and set aside*. This action having

been brought about by the action of defendant Bliss, he and his assignee are not in a position to question its regularity.

The judgment by confession in favor of Wade and against Trenouth was entered without the direction, knowledge, or consent of Wade. The fact that Wright was the attorney of Wade in this cause did not authorize him to act on behalf of the latter, and consent to a judgment by confession in that case. We do not understand that the motive of the attorney is impugned. He doubtless acted with a good intent, and, as he supposed, in the interest of his client; but as he was not authorized so to do, and as the client is not shown to have ratified his acts, they cannot be upheld. The findings seem responsive to and cover all the material issues made by the pleadings, and are supported by the evidence.

We deem it unnecessary to discuss minutely all of the minor objections presented by the record, as they present no errors calling for a reversal of the case, and we are of opinion defendant Judson obtained judgment for all that to which he was entitled, and that the judgment and order appealed from should be affirmed.

The only question presented upon the appeal of plaintiffs in the same cause, (No. 9,022,) not hereinbefore considered, is founded upon the fact that there was due from them at the date of suit brought the sum of \$2,889.85 on account of the wheat purchased, which they paid into court. Of this sum, \$2,620.50 was due Wade, and the balance of \$269.35 was payable to Bliss, or his assignee, Judson. The court finds that the plaintiffs were at all times ready and willing to pay this sum to Bliss, but that he refused to receive it, and therefore very properly refused to add interest to his judgment. The court, however, rendered judgment in favor of Wade for the amount due him in January, 1878, with interest and costs. The contention of plaintiffs is that this was error; that the fund by them paid into court should have been distributed to the parties entitled thereto, in the proper proportions; and that to extend their liability beyond the actual amount due from them was error. Had the theory upon which plaintiffs brought their action been sustained, the result they claim would have followed. This court, however, held their pleading insufficient to support that theory; and it was only upon the amendment of their pleading, and the filing of an answer, counter-claim, and cross-complaint by the defendant Bliss, that the character of the action was so far changed that a final disposition of the whole matter could be had in this cause. Defendant Wade was always ready and willing to receive what was confessedly due him. That he was delayed in receiving it was no fault of his, and, if a burden is to be borne by the accumulation of interest, it is more in consonance with law and equity that plaintiffs, who, by their improper or defective proceedings, caused the delay, should bear the burden occasioned thereby, than that defendant Wade, who was in no wise in fault, should bear it.

We think, under the circumstances, the judgment in favor of Wade and Judson was proper as rendered, and that it should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgments and order are affirmed.

#### NOTE.

A general demurrer, addressed to the whole complaint, is properly overruled if in any part of the complaint a cause of action is stated. *Fleming v. Albeck*, (Cal.) 7 Pac. Rep. 659.

A general demurrer to an answer cannot be sustained where there is one count that presents an issue for trial. *Board of Co. Com'rs of San Miguel Co. v. Long*, (Colo.) 8 Pac. Rep. 923. See *Caldwell v. Ruddy*, (Idaho,) 1 Pac. Rep. 339.

A general demurrer to a whole pleading must be overruled if there be one good cause of action, or one good defense, in a pleading to which it is interposed. *First Nat. Bank of St. Paul v. Nathan*, (Minn.) 9 N. W. Rep. 626.

Where one count of a complaint states, in itself, a good and complete cause of action for a personal judgment, a general demurrer thereto will not lie merely because another count attempts and fails to state another cause of action for a lien. *Bronson v. Markey*, (Wis.) 10 N. W. Rep. 166.

Where the allegations of a petition are indefinite, but the language, when given its ordinary meaning, shows a liability of the defendant in favor of the plaintiff, a demurrer, on the ground that the facts stated do not constitute a cause of action, should be overruled. *Rathburn v. Burlington & M. R. R. Co.*, (Neb.) 20 N. W. Rep. 390.

If one of the several paragraphs of a complaint is good, it is error to render judgment upon a general demurrer in favor of the defendant. *Burke v. Simonson*, (Ind.) 3 N. E. Rep. 826.

Where a complaint states facts sufficient to constitute a cause of action for part of the relief demanded, it will be held good on demurrer. *Culbertson v. Munson*, (Ind.) 4 N. E. Rep. 57.

(71 Cal. 452)

### FISK v. ATKINSON and others. (No. 9,017.)

Filed March 24, 1886.

#### ACTION—ABATEMENT OF ACTION PENDING EARLIER ACTION FOR SAME CAUSE.

If at the commencement of an action there was another action pending and undecided, brought by the same plaintiff against the same defendant, and for the same cause of action, the former must abate pending the latter.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

*Joseph Mee*, for appellant.

*A. Campbell and Campbell & Sanderson*, for respondent.

FOOTE, C. This is an appeal from a judgment rendered in an action on an undertaking for the release of an attachment, and an order denying the defendant a new trial. As one of his defenses set up in his answer, Byrnes (Atkinson not having been served with process) alleged that there was another action pending against him, brought by the same party plaintiff, for the same cause of action. Findings of fact were waived, but the statement in the record of this cause plainly indicates that the contention of the defendant is true, and

that at the time the present action was instituted there was another action pending and undecided, brought by the same plaintiff against the same defendant, and for the same cause of action, and the latter should have had judgment rendered in his favor in the trial court that the present action be abated. The judgment and order appealed from should therefore be reversed, and the court below directed to enter judgment in favor of the defendant that this action abate, and for his costs and disbursements.

We concur: SEARLS, C., BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to enter judgment in favor of defendant Byrnes that the action abate, and for his costs and disbursements.

(69 Cal. 180)

PEOPLE v. WONG AH FOQ. (No. 20,142.)

Filed March 26, 1886.

1. HOMICIDE—MURDER—EVIDENCE—STATEMENTS OF DECEASED AS PART OF RES GESTÆ.

On a trial for murder, statements made by deceased, following almost instantly upon the infliction of the fatal wound, though not made in defendant's presence, are admissible in evidence.<sup>1</sup>

2. CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be authorized by newly-discovered evidence which is merely cumulated.

3. SAME—APPEAL—FAVORABLE INSTRUCTIONS NOT GROUND FOR REVERSAL.

A defendant cannot object to instructions which are more favorable to him than they should be, and though erroneous are no ground for reversal.

4. HOMICIDE—MURDER—INSTRUCTION—WHERE EVIDENCE NOT CONFLICTING.

If there is no conflict in the evidence as to the act committed being murder, it is not error for the court to so state to the jury.

5. CRIMINAL LAW—TRIAL—EVIDENCE—RELATION OF WITNESS TO ACCUSED.

Where, in a criminal trial, a witness testifies in behalf of his father, the court may properly admit evidence of their relationship, and, alluding to such fact as being in evidence, charge the jury that they may consult their general knowledge and experience in life as to whether or not a son would be apt, in giving his testimony, to favor his father.

6. SAME—INSTRUCTIONS—EVIDENCE OF ALIBI.

Instructions concerning the kind of evidence which might be resorted to to prove an *alibi* reviewed, and held not erroneous.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

Charles B. Darwin, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

FOOTE, C. The defendant was found guilty by a jury of murder in the first degree. From the judgment of conviction, and the order de-

<sup>1</sup>See note at end of case.

nying his motion for a new trial, he prosecutes this appeal. The declarations of the man slain were properly admitted in evidence in the exercise by the court of a sound discretion. They had been made only a few moments preceding his death, and appear to have been uttered, if not in the immediate presence of the accused, yet before the latter had proceeded more than across Clay street from the place where the deceased fell wounded, following almost *eo instanti* the firing of the fatal shot; thus being cotemporaneous with, and illustrative of, the character of the main facts under consideration. 1 Greenl. Ev. § 108; *Com. v. McPike*, 3 Cush. 181; 1 Bish. Crim. Proc. § 10986, note 4, and cases cited.

It was not error for the court to refuse a new trial because of the offer made by the defendant, by affidavits of him and others, of allegedly newly-discovered evidence. That evidence was in the main cumulative, and, besides, those affidavits were contradicted in a material respect by that of I. M. Floyd, offered by the people.

The court refused two instructions asked by the defendant, but they were afterwards included in the charge given on the part of that tribunal. There is no error of which the defendant can be heard to complain, from the fact that the court charged the jury they should acquit if they had, from the evidence, a reasonable doubt of the defendant's guilt or innocence. It was really more favorable to him than he had a legal right to expect.

We see no error in the court informing the jury that there was *some* evidence in the case of a circumstantial nature. Taking the whole charge, it did not convey to them any opinion of the court as to the weight of it, as evidence.

Under the facts of this case, as given in evidence, we can perceive no error in the judge stating to the jury, in the charge, that he understood from the argument and testimony that the offense committed was probably murder or nothing. There was no conflict in the evidence as to the act committed being murder; the conflict was as to who was the actual perpetrator of it.

As part of its charge, which is most strenuously assailed by the defendant, as being calculated to mislead the jury, and to inform them that evidence of an *alibi* is to be distrusted, in that it is more easily fabricated, and holds out greater temptation therefor, than other kinds of evidence, this language was employed:

"Now, in determining that fact, gentlemen, I instruct you that evidence to establish an *alibi*, like any other evidence, may be open to special observation. Persons may, perhaps, fabricate with greater hopes of success, or less fear of punishment, than most other kinds of evidence; and honest witnesses often mistake dates and periods of time and identity of people seen, and other things about which they testify."

Upon a close examination of the whole charge, including the part quoted, and giving to it an unstrained interpretation, we do not perceive that the court charged the jury upon the weight of evidence. It is

undoubtedly true, as a matter of fact, that untruthful witnesses may fabricate anything, and testimony of an *alibi* may, perhaps, be more easily fabricated than most other kinds, and those facts are within the knowledge of most persons of ordinary understanding and experience; and in support of this theory we have the authority of eminent jurists. It is perfectly proper for a court, where a son testifies in behalf of a father, to admit evidence to the jury of their relationship; and, alluding to such a fact as being in evidence, to charge the jury that they may consult their general knowledge and experience in life as to whether or not a son would perhaps be apt to favor his father in giving his testimony, and the like, this being in the nature of an observation upon a witness and his relationship to the accused. Bish. Crim. Proc. § 982. And in the present instance we do not see how the jury could have understood that they were to lay less stress upon the evidence of *alibi* than any other testimony; for, in fact, they were expressly informed that "evidence to establish an *alibi*, like any other evidence, may be open to special observations;" and these special observations did not go to the length of informing the jury positively that such evidence was less reliable than other testimony in the present case, but informed them simply of the legal infirmities which were "perhaps" inherent in such testimony, leaving to the jury fully and exclusively as their province to determine its truth or falsity; and, viewed in the light of good sense, we do not see that the language complained of went beyond a reasonable and fair latitude of observation permissible from the judge to the jury. Bish. Crim. Proc. §§ 982, 1064.

There being no error in the record, the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

#### NOTE.

In the trial upon an indictment for murder, the exclamations of the deceased immediately upon the firing of the shot by which he was killed, and to an answer to a question asked within a very few minutes thereafter, are admissible as part of the *res gestæ*. *People v. Simpson*, (Mich.) 12 N. W. Rep. 662.

In the trial of an indictment for murder, the statements of the deceased, made some days after the shooting, are not admissible in evidence as part of the *res gestæ*. *People v. Wasson*, (Cal.) 4 Pac. Rep. 555.

In an indictment for murder, declarations of the deceased, made half or three-quarters of an hour after an affray in which the deceased was fatally shot, and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as a part of the *res gestæ*. *People v. Dewey*, (Idaho,) 6 Pac. Rep. 103.

The declaration of the deceased, on trial of an indictment for murder, made immediately after the shooting, as to who shot him, is, in the discretion of the trial court, admissible in evidence as part of the *res gestæ*. *People v. Callaghan*, (Utah,) 6 Pac. Rep. 49.

A man having been shot by another, not fatally, exclaiming, "You have killed me," ran some 80 feet to the door of another room in the same house, and, on being admit-

ted, said: "I am shot; William Kirby has shot me." Not more than two minutes had elapsed from the time of the shooting. The court held that these declarations were proper in evidence against Kirby on an indictment. *Kirby v. Com.*, 77 Va. 681.

(69 Cal. 169)

**PEOPLE v. FRENCH. (No. 20,071.)**

Filed March 26, 1886.

**1. WITNESS—EXAMINATION—FORMER CONTRADICTORY STATEMENTS.**

On a trial for murder, if a witness for the defense testifies to facts from which the jury might infer that the deceased, on the day of the homicide, left his house for the purpose of bringing about an encounter with the defendant, the prosecution may cross-examine him as to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of the deceased towards the defendant.

**2. SAME—TESTIMONY BY WITNESS AS TO MEANING OF WORDS USED.**

On a trial for murder, a witness cannot testify as to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between the defendant and the deceased. Such matter is for the jury, on proof of the words or circumstances themselves, and if the testimony concerning the witness' understanding or inference is stricken out, and the jury is instructed to disregard it, the court does not in so ordering commit any error prejudicial to the defendant.

**3. SAME—WITNESSES IN MURDER TRIAL—REDIRECT EXAMINATION.**

On a trial for murder, a witness for the prosecution may, on redirect examination, testify as to a statement made by the defendant relating to and connected with the circumstances of the homicide, as detailed on the examination in chief and on his cross-examination.

**4. HOMICIDE—MURDER—TRIAL—PROVINCE OF JURY IN FIXING PUNISHMENT.**

On a trial for murder, if the jury, after agreeing to find the defendant guilty of murder in the first degree, are unable to agree upon the punishment, and thereupon come into court; and the judge instructs them explicitly that they have the right to fix the penalty at death, or imprisonment for life, or to bring in a verdict of guilty of murder in the first degree without specifying the penalty; and the jury subsequently returns for further instructions, when the judge again charges them as above stated, adding that "if there is nothing specified in your verdict as to the penalty, the court will have its duty to perform, but what that duty will be the court will not say;" and the jury subsequently brings in a verdict of guilty of murder in the first degree, without specifying the penalty; and counsel for the defendant then state to the jury that the effect of their verdict is to impose upon him the death penalty, whereupon one of the jurors says: "If that is the effect of the verdict, it is not my verdict;" but upon polling the jury such juror, after considerable hesitation, consents to the verdict, and states that he leaves "the responsibility to the court,"—such instructions are without error, as the jury could not have been misled thereby on the question of punishment.

**5. SAME—FAILURE OF JURY TO FIX PUNISHMENT.**

Where, upon a trial for murder, the defendant is convicted of murder in the first degree, he cannot escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or returned a verdict which was silent as to the penalty.

In bank. Appeal from superior court, county of San Joaquin.

*Eagon & Armstrong*, for appellant.

*E. C. Marshall*, Atty. Gen., for the State.

McKEE, J. Uzza F. French, defendant and appellant in this case, was convicted by the verdict and judgment of the superior court of San Joaquin county of murder in the first degree, for the unlawful killing of Peter Wells, and sentenced to suffer the death penalty; and

he appeals from the judgment, and the order denying a motion made by him for a new trial.

The homicide was committed on the fourteenth of March, 1884, in the town of Oleta, in Amador county.

The contention made on the appeal is that the conviction is illegal because of irregularities and errors in law committed at the trial, against the exceptions of defendant. The errors assigned are predicated upon the admission of testimony against the defendant's objections and exceptions, and upon instructions given to the jury to his prejudice.

1. Marcellus Lee, a witness for defendant, on his examination in chief, gave testimony tending to show that between 8 and 9 o'clock of the morning of the day of the homicide, Wells, having made preparation to leave his house for the town of Oleta, asked the witness, who was then in his employment, to go with him; but the witness refused to go, and urged Wells not to go, because he believed "from what had occurred a day or two before that French would be at Oleta;" and he said to Wells, "It would be going into the enemy's camp;" to which Wells replied, "He could not help that; he was going, \* \* \* and if there was to be trouble, there was no use in trying to stave it off." About 9 o'clock A. M. Wells rode off to Oleta in company with his son. On cross-examination the witness testified, without objection, that he and Wells were the only persons present at the conversation stated in his direct testimony; but that he had had on that morning two or three other conversations with Wells, at which other persons were present; and that, on the day before the conversation, he had heard Wells say he was going to Oleta to hunt for one of his horses which was lost. After so testifying on his cross-examination, the state asked him this question: "Within three or four days after the shooting did you have any conversation with Mrs. Wells, in which you said you had told Peter Wells that if he would let you have a rifle you would put French in a prospect hole, and that Wells replied he 'didn't want anything of that kind in his.'" To that question defendant's counsel objected: "The answer must be immaterial, and to lay the foundation for a contradiction of an immaterial statement; it is immaterial." The objections were overruled and the defendant excepted. Answering the question, the witness testified "that in a conversation which occurred a day or two before \* \* \* the trouble, I told Wells, 'If I thought that man [French] was hunting us in the *chaparral*, I would take a rifle and go down and get him;' \* \* \* and Wells said to me, 'No;' \* \* \* and I think I told Mrs. Wells what, in substance, I said to Wells."

It is contended that neither question nor answer was in response to the matter testified by the witness in his examination in chief. But the matter of the direct testimony of the witness was the fact that Wells, being armed, left his own house, on the morning of the

day of the homicide, to go to Oleta, where he knew French was, and the statement made by him, before starting, as to the trouble between French and himself, from which the jury could have drawn the inference that the object of Wells in going to Oleta, under the circumstances, was to bring about a rencounter between French and himself. Whether Wells went to Oleta with a hostile or peaceable intent towards French—with a determination to force a fight or quarrel upon him or not—was therefore a matter presented to the consideration of the jury by the direct testimony of the witness; and in the consideration of that question the jury were entitled, on the cross-examination of the witness, to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of the deceased towards the defendant. The Code rule is that a witness in a civil or criminal action may be asked, on cross-examination, whether he has made any statement inconsistent with his direct testimony relative to any fact therein stated, and may also be examined as to any matter relevant to or connected therewith. Sections 2048, 2049, 2052, Code Civil Proc. Besides, in the cross-examination of a witness, much must be left to the discretion of the judge who presides at the trial. Unless the record on appeal shows an abuse of discretion, appellate tribunals do not interfere. We think there was no abuse of discretion in overruling the objections made to the question. The matter stated in the question and answer was not irrelevant or immaterial.

2. The next assignment of error is that the court, at the close of the evidence given for defendant, permitted the prosecution to ask of Joseph Young, a witness called by the prosecution in rebuttal of certain evidence given by defendant, the following question: "During your association with the deceased, Wells, and the *actions* on his part,—from *words* of his, and a combination of all the circumstances that would tend to throw light on the subject,—what was the feeling, and the expressed feeling, between the deceased, Wells, and the defendant?" The question was asked of the witness on his redirect examination. It was objected that the question was incompetent, irrelevant, and immaterial; but the court, against the objections and exceptions taken, permitted the witness to answer.

We think the ruling was erroneous. A witness cannot testify to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between two persons. That is a matter for the jury, upon proof of the words or circumstances themselves. But although the question was answered, the answers of the witness were afterwards stricken out. In answering the questions the following took place:

*Witness.* "He [Wells] told me 'if Uz [French] would come there he would be treated just as well as ever.' I never heard him make any threats at all."

*The Court.* "The last part of his answer is stricken out." *Witness continued:* "He said if Uz would come to his house he would be treated just as well as he ever was; this was said two or three days before the shooting. \* \* \*" *Question.* "I understand the remark made was two or three days before the killing?" *Answer.* "Either two or three." *Defendant's Counsel.* "I move that that be stricken out. \* \* \*" *The Court.* "You have your exception." *Defendant's Counsel.* "We move to strike out the answer of the witness: 'If he had come to his house he would have been treated just as well as ever,' on the grounds that it is incompetent, irrelevant, and immaterial." *District Attorney.* "Let it be stricken out. We do not care anything about it."

This was the only testimony in the case stricken out by consent; and the court, in its charge to the jury, instructed upon the subject as follows:

"The court instructs the jury that they should carefully exclude from consideration all matters of evidence offered and excluded, and also that which was admitted and afterwards stricken out, either by express order of the court, or by consent of counsel by whom it was adduced."

As, therefore, the answers of the witness were stricken out, and the question remained unanswered, the ruling of the court as to the question did not affect any substantial right of the defendant.

3. The next assignment of error is that the court overruled objections made by defendant to a question asked by the prosecution on the redirect examination of a son of the deceased, who had been examined in chief by the district attorney and cross-examined by defendant's counsel. The question was this: "State whether, as defendant passed by you, going down the street, did you hear him say anything about Joe Young." *Defendant's Counsel.* "We object to it; that is something not testified before." The court overruled the objection, and the witness answering, testified: "He [French] said: 'If I had the other load into Joe Young I would be satisfied.'"

We think there was no error committed in overruling the objection. The witness testified on his examination in chief to the effect that on the morning of the fourteenth of March he left home with his father to hunt for a horse which was tracked to a stable in Oleta; that they remained at the stable four or five minutes, and then walked from there into Main street, where, after walking about 150 yards, they saw defendant, with a double-barreled shotgun, sitting in front of a saloon on the opposite side of the street; and, according to the testimony of the witness, the following occurred in the street:

"French, when he saw us, called out: 'Stop, you s—— of a b——; I've got you where I wanted you!' 'Hold on,' said father; 'you are accusing me wrongfully.' About that time French raised the gun and cocked it. My father stopped, and did not move after that at all. My father said: 'Hold, now! you are too fast;' and French said: 'You are a damned liar;' and father said: 'You are accusing me wrongfully. I don't want any of this.' French said: 'I do; I have been hunting for it;' and father said: 'Uz, set down your gun, and come to me like a man, and we will settle it;' and French said: 'You are a liar and a s—— of a b——;' and then he said: 'Take the children out of the way; get out of that window, woman!' and then he shot.

Saw my father's hands,—there was nothing in them; they were by his side. My father did not make any attempt or demonstration towards drawing a weapon. After the shot my father fell backwards on the porch. He was shot in the forehead with a buckshot."

On his cross-examination the witness also testified:

"About four days before that French said he had heard considerable threats that my father and Joe Young had made against him. Father knew what French had said. My grandfather had told him."

After which the witness, being recalled by the prosecution, on his redirect examination testified, without objection, that French, just after he shot, stepped into the saloon, and immediately stepped out again, with his gun in his hand, and started to go down the street, passing within four or five feet of the witness. Upon this the question, to which the defendant objected, was asked and answered; and as both question and answer related to and were connected with the circumstances of the homicide, as detailed on the examination in chief and cross-examination of the witness, the objection taken to the question was properly overruled.

4. The last assignment of error is that the jury were misled by the instructions of the court, upon the question of punishment, to return a verdict of murder in the first degree, without a declaration of what the punishment should be. In its elaborate charge to the jury the court several times—twice of its own motion and once at the request of the prosecution—instructed them as to their powers and duties upon the question of punishment. In those given of its own motion the court instructed them substantially in the language of section 190 of the Penal Code, which declares: "Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same." And the instruction upon the same subject, given at the request of the prosecution, was as follows:

"Should the jury believe from the evidence, and beyond a reasonable doubt, that the defendant is guilty of murder in the first degree, and should the jury so find, then the jury has the right, in such verdict, to fix the penalty of death or of imprisonment in the state prison for life. The jury has the right, in case they find a verdict of guilty of murder in the first degree, to do so without fixing the penalty. In other words, gentlemen of the jury, if you find the defendant guilty of murder in the first degree, and believe that he should be punished by death, you may say in your verdict, 'We, the jury, find the defendant guilty of murder in the first degree,' or if you find him guilty, and believe that his punishment should be confinement in the state prison for life, you should say so in your verdict."

The instructions which were given were correct. *People v. Jones*, 63 Cal. 168; *People v. Murback*, 64 Cal. 369.

Upon receiving the charge of the court the jury retired for deliberation, and afterwards returned into court, and by their foreman reported that they had not agreed upon a verdict, and that a juror desired to be further informed upon the question of punishment. The juror referred to then arose and the following proceeding took place:

"*Juror*. I did not want to sentence the defendant to death. *Court*. Do I understand the jury to disagree simply upon the matter of punishment? *Juror*. Yes, sir; I am not willing to pass sentence \* \* \* by which the man should be killed, because I think there were some mitigating circumstances. \* \* \* *Court*. The jury have the right to fix the penalty at death or imprisonment for life. \* \* \* If the jury bring in a verdict of guilty of murder in the first degree, without specifying the penalty, they may do so. *Juror*. Then we are not compelled to do it? *Court*. You are not compelled to do it."

Again the jury retired, and again they returned into court for information upon the same question. The court read to them section 190 of the Penal Code, and, after it was read, the same juror arose and said: "I got the impression that if the verdict was returned of guilty of murder in the first degree, without anything further, it inflicted the death penalty. Some of my fellow-jurors thought it did not. I want to be certain of that." Again the court read section 190 of the Penal Code, and in connection therewith informed the jury as follows:

"I think it is the duty of the jury to fix the penalty, but at the same time, if you have agreed on a verdict of murder in the first degree, the court will receive it. If there is nothing specified as to the penalty, the court will have its duty to perform, but what the duty will be the court will not say. I think it is a jury's duty to fix the penalty,—they ought to do it."

Upon receiving this information the jury once more retired, and afterwards returned into court with their verdict. It was declared by the foreman, and the court asked defendant's counsel if he desired to have the jury polled, to which counsel replied: "We do not." Thereupon the clerk was directed to record the verdict; and that being done, the clerk read it to the jury as recorded, and inquired of them "if that was their verdict;" but before all the jurors answered defendant's counsel interposed with the following expression: "That verdict has been rendered under a misapprehension of the court's instructions and the law, and if the jury knew, as is the fact, that that means hang, they would not have brought in that verdict." After this the same juror arose and said: "If that is the effect of my verdict, that is not my verdict." Upon that expression of disagreement the court again asked defendant's counsel if he at that time desired to have the jury polled, to which counsel answered: "Yes; we do." Under the direction of the court the clerk proceeded to poll the jury, each of whom, as his name was called, answered that it was his verdict. When the name of the hesitating juror was called the record shows that he expressed his agreement in the manner following:

"*The Clerk*. Is this your verdict? *Juror*. No; not if—; and murmured in a low tone of voice something which could not be heard. *The Court*. What we desire to know is whether this is your verdict. *Juror*. Yes; that is my verdict, and I will leave the responsibility to the court."

The polling of the jury proceeded further, and all the jurors answered: "Yes; that is my verdict." The jury was then discharged,

and the defendant was remanded into the custody of the sheriff and an order duly entered fixing the time for sentence.

Hesitancy upon the part of the juror upon the question of punishment is very apparent; but that was not due to the instructions upon the question. The instructions iterated and reiterated, time and again, were unambiguous, and entirely consistent with the criminal law of the question as formulated by section 190 of the Penal Code. They were not contradictory. On the contrary, they were pointed and definite as to the powers exercisable by the jury upon the subject of punishment, in case they agreed upon a verdict of murder in the first degree. The instructions were therefore correct; and being correct, and free from ambiguity of expression, it is not to be presumed that the jurors to whom they were given did not apprehend them, or that any juror may have been misled by them.

It is true that the judge himself seems to have hesitated about giving information to the jury as to what *his* duty would be in case of the return of a verdict of murder in the first degree, without an expression of agreement upon the question of punishment; but the juror who was instructed as to his duty could not have been misled by that in considering the question. He knew from the instructions that if no verdict was returned upon the question of punishment the responsibility of inflicting the punishment upon the verdict to which he did agree would be upon the court, and there, as he expressed it, he "would leave it."

Of the duty of the court upon receiving such a verdict there could have been no doubt in the mind of the judge. As declared by this court in *People v. Welch*, 49 Cal. 185:

"If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted in cases where they cannot agree on imprisonment; since if the verdict is silent in respect to the penalty, the court must sentence the defendant to death."

In other words, a person convicted of murder in the first degree shall not escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty.

We find no prejudicial errors in the record, and the judgment and order must be affirmed. It is so ordered.

We concur: THORNTON, J.; MORRISON, C. J.; MYRICK, J.

(99 Cal. 160)

## HALE v. AKERS and others. (No. 8,099.)

Filed March 28, 1886.

## 1. PUBLIC LANDS—LAND TITLES IN CALIFORNIA—EFFECT OF DECREE OF CONFIRMATION.

The final decrees of the board of commissioners, or of the district or supreme court, or any patent issued under the act of congress of March 8, 1851, to ascertain and settle private land claims in California, are conclusive only between the United States and the claimants, and do not affect interests of third persons; such third persons being those whose title accrued before the duty of the government and its rights under the treaty with Mexico attached.

## 2. SAME—DECREE OF CONFIRMATION OF LAND CLAIM IN CALIFORNIA—SURVEY.

Where a claim to public land in California has been confirmed by a decree of the district court, under the act of congress of March 8, 1851, and the decree fixes the boundaries of the claim, and remains unreversed, the survey must, in all respects, conform to the decree.

## 3. SAME—OVERLAPPING OF PATENTS TO LAND—BOUNDARIES.

A grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises in determining a controversy in regard thereto, caused by the overlapping of two patents, than would a floating grant, although the latter be first surveyed and patented.

## 4. SAME—MEXICAN TITLES IN CALIFORNIA—PUEBLO LANDS.

Where, under the Mexican law, pueblos were established, they became invested, even without any formal assignment, with a certain title to the pueblo lands, and this title was recognized by the act of congress of March 8, 1851, as in the nature of a grant, and has ever since been upheld and protected by the courts:

Commissioners' decision.

Department 2. Appeal from superior court, county of Sonoma.

*William D. Bliss*, for appellants.

*Porter & Rutledge*, for respondents.

BELCHER, C. C. This is an action to recover possession of about 15 acres of land in Sonoma county. Both parties claim title in fee. The plaintiffs deraign their title from Jacob P. Leese, to whom a Mexican grant of five and a half leagues was confirmed, and in August, 1859, patented by the United States. The defendant Stephen Akers deraigns his title from the city of Sonoma, to which a patent was issued by the United States in March, 1880, for certain lands confirmed to it as Pueblo lands. Both patents cover the land in controversy, and the question for decision is, which party shows the better right to it?

The facts as found by the court below are as follows: In October, 1841, the governor of California made a grant to Jacob P. Leese of the place called Huichica, in the neighborhood of Sonoma, containing two square leagues, and having for its western boundary the Arroyo Seco. In July, 1844, the governor made a second grant to Leese of three and a half leagues of the land called Huichica, and bounded "on the west by Estero de Sonoma, as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little hills of Huichica."

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In April, 1852, Leese presented to the board of land commissioners a claim for confirmation of his title to the whole Huichica tract of five and a half leagues, and his claim was confirmed by the board in April, 1853, and by the United States district court in 1856. The appeal to the supreme court was dismissed in December, 1856. The decree of confirmation gave to Leese the land known by the name of Huichica, containing five and one-half square leagues, and bounded it "on the south by the marshy land adjoining the bay of San Francisco, and on the west by the *estero* of Sonoma, as far as the Trancas, taking the direction (*el rumbo*, direction or course) of the Arroyo Seco." Under this decree a deputy surveyor made a survey of the Huichica in December, 1858, and his survey was approved by the United States surveyor general for the state, on June 4, 1859. No notice was given of the survey or of its approval, and neither the city of Sonoma, nor any officer thereof, nor the defendant, had any notice of the proceeding relative to its approval. In accordance with this survey, a patent for the Huichica *rancho* was issued by the United States to Leese, dated August 3, 1859. It was in the usual form of patents issued for confirmed Mexican grants, and recited the second grant, the confirmation, and the survey. The western boundary, as shown on the plat in the patent, is the Sonoma creek, from a post marked L, at the lower landing, as far as a post marked L, at the Trancas; and thence a straight line running north, 37 deg. east, 156 chains, to a post marked L, on the Arroyo Seco, at the Huichica hills. This last line is known as the "Trancas Line."

In June, 1835, the governor of California instructed Gen. Vallejo, director of colonization, to establish the pueblo of Sonoma; and in that year Vallejo established the pueblo, and made a survey thereof, with the following boundaries: "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up that creek to the Agua Caliente creek; thence easterly to the foot-hills north of the city to the place of beginning." This tract Gen. Vallejo laid out and platted into lots and blocks, and in the year 1835 established families on the same, occupying the tract along the Arroyo Seco down to the point where it entered the salt marsh. He also made a report of all his proceedings to the governor, and they were duly approved.

In May, 1852, the mayor and common council of the city of Sonoma presented to the board of commissioners their claim, as successors of the pueblo, for all the land of the pueblo of Sonoma, as established by Vallejo; and their claim was confirmed by the board in January, 1856. An appeal was taken to the district court, and under the provisions of an act of congress passed July 1, 1864, the case was transferred to the circuit court, where the claim was confirmed on the second day of November, 1864. The decree of confirmation fixed the Arroyo Seco as the eastern boundary of the pueblo.

In September, 1868, a survey of the land so confirmed was made

by the surveyor general, and in August, 1872, was reported to the land department for approval. Due notice of this survey was given and published, as required by the act of congress of July 1, 1864, and the matter of the conflict between this survey and the survey of the Huichica grant was heard before the commissioner of the general land-office in March, 1876. That officer adjudged and determined that "a direct line running from the point marked 'Trancas,' on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh, and thence following the direction of the Arroyo Seco to the Little Huichica hills, should constitute the south-easterly boundary of the pueblo of Sonoma;" and directed the surveyor general to amend his survey accordingly. An amended survey was made as required, and due notice thereof given. The amended survey was reported to the general land-office for approval, and, upon a hearing had before the commissioner in December, 1878, that officer approved the survey, and fixed the Arroyo Seco as the boundary between the pueblo of Sonoma and the Huichica grant. No appeal was taken from this decision, and the same became final. A patent for the pueblo lands was issued by the United States to the mayor and common council of the city of Sonoma, in accordance with the decrees of confirmation and survey, dated March 31, 1880; and this patent covered 423 acres of land embraced in the Huichica patent, of which the 15 acres in controversy are a part.

In 1851 the defendant Stephen Akers entered into the possession of the land sued for under a contract with the city of Sonoma for its purchase, and he has remained in possession, cultivating and improving it, ever since. In May, 1858, the city conveyed to him this land and enough more to make 111 acres, it all being within the city limits as surveyed and patented. In January, 1859, the grantee of Leese conveyed to Theodore L. Schell, the plaintiff's testator, 470 acres of land, parcel of the Huichica grant, as surveyed and covering the 111 acres conveyed as aforesaid to Akers. In September, 1860, Schell commenced an action against Akers to recover from him the possession of all of the 111 acres; and while the action was pending the parties to it, on the eleventh day of October following, entered into a written agreement, which was signed and acknowledged by them and recorded. By this agreement Akers released to Schell the east half of the 111-acre tract, which was described by metes and bounds; and the agreement then proceeded as follows:

"The said Schell hereby covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above released tract of land, that he will deliver the possession of the same, or such portions thereof as may be so established, together with a yearly rent from this date of \$5 per acre for the land so to be delivered; and the said Akers hereby covenants and agrees that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent, that he will deliver possession to the said Schell of all or such portion of the remainder of said above-described tract of land as may be within the line of said Huichica patent,

and will pay a yearly rent for the same, at the rate of \$5 per acre, to the said Schell."

The action was then dismissed, and a fence was built by the parties, extending northerly across the land, and dividing it into two fields of nearly equal size. Akers surrendered to Schell all that portion lying east of the fence, and retained possession of all that portion lying west of it. The land in controversy here is a part of the land which Akers so retained in his possession. Upon the findings the court rendered judgment in favor of the defendants. The plaintiffs appealed, and the case is brought here on the judgment roll.

There are two sufficient answers to the claims made by the appellants:

1. It was expressly provided by the act of congress, passed March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California," that the final decrees of the board of commissioners, or of the district or supreme court, or any patent to be issued under the act, should be conclusive only between the United States and the claimants, and should not affect interests of third persons. *Rodrigues v. U. S.*, 1 Wall. 588. It has been held by this court that the "third persons" against whose interests the action of the government and patent are not conclusive are those whose title accrued before the duty of the government and its rights under the treaty attached. *Teschmacher v. Thompson*, 18 Cal. 27. Where two patents cover the premises in controversy, "the main question in the case, as in all cases where patents founded upon previously existing concessions overlap, is which of the two original concessions carried the better right to the premises?" This was said in *Henshaw v. Bissell*, 18 Wall. 255; and in that case, there being two patents covering the same land, it was held that in determining such a controversy a grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.

Here it appears that the pueblo of Sonoma was established by the direction and with the approval of the governor of California in 1835. Its boundaries were surveyed and fixed. The tract was laid out in lots and blocks, and families were established upon those lots and blocks along the Arroyo Seco, which was its eastern line down to the salt marsh. "By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period of her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. Those laws

and ordinances provided for the assignment to the pueblos or towns when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land." *Townsend v. Greeley*, 5 Wall. 336. And when pueblos were established they became invested, even without any formal assignment, with a certain title to the pueblo lands. This title was recognized by the act of March 3, 1851, as in the nature of a grant, and it has ever since been upheld and protected by the decisions of this court and of the supreme court of the United States. *Hart v. Burnett*, 15 Cal. 530; *Grisar v. McDowell*, 6 Wall. 863.

In the first grant to Leese the Arroyo Seco is expressly named as its western boundary. In the second grant, and in the decree of confirmation, the western boundary is the Estero de Sonoma as far as the Trancas, thence taking the direction of the Arroyo Seco. It has been held, when a land claim had been confirmed by a decree of the district court, under the act of March 3, 1851, and the decree fixed the boundaries of the claim, and remained unreversed, that the survey must conform to the decree in all respects. *The Fossat Case*, 2 Wall. 649.

What was meant by the words, "taking the direction of the Arroyo Seco?" It seems to us, as it did to the commissioner of the general land-office, when the matter of the conflict was before him, that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek or gulch. If this be so, then it is clear that the line, as run by the surveyor, did not conform to the decree, but took in lands not covered by it. It must follow that, to the lands so taken in, the original concession to the pueblo, and the patent issued upon confirmation thereof, carried the better right.

2. When Schell and Akers executed their written agreement in October, 1860, the Huichica patent had been issued to Leese, and Schell had his deed. The Sonoma claim had been confirmed by the commissioners, and took in the land lying between the Trancas line and the Arroyo Seco. The city was asserting a right to that land, and the case was pending before the courts. Akers had a deed to 111 acres of the land, and was in possession of it. Under these circumstances, the parties compromised the action, which had been commenced by dividing the 111 acres about equally between them. Akers released and surrendered to Schell the eastern half and retained the western half. In consideration of this, Schell agreed, "in the event the city of Sonoma establishes her claim to any part or portion" of the land released, to deliver back to Akers such part or portion, and to pay a yearly rent of five dollars per acre for the same while he might hold it. And Akers agreed, in the event the city should not be able to establish her claim beyond the line of the Huichica patent, to deliver to Schell so much of the land as he retained within that line, and to pay to him a like rent of five dollars per acre. It is clear from this, we think, that the only establishment of the Sonoma claim

which the parties contemplated was such as would result from the action of the courts upon it, and the issuing of a patent by the government in pursuance of their decrees. The parties evidently thought that if the city should finally succeed in establishing its claim, and receive a patent for any of the land within the lines of the Huichica patent, it would have the better title to the land. They could, therefore, avoid litigation and expense, and safely await the issue of the city's contest. As we have seen, they rightly interpreted the law, and so long as Schell lived he acquiesced in the arrangement. After his death his executors thought it their duty to raise the question again, and this action was commenced. In our opinion the agreement was intended to be and was binding upon the parties, and decisive of their rights when it was executed, and it remains so still.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

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(69 Cal. 153)

HOWELL v. STETEFELDT FURNACE Co., Original Defendant, and another, Substituted Defendant. (No. 9,206.)

Filed March 26, 1886.

1. ACTIONS—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—TIME FOR APPLICATION.

A defendant is not entitled to have the place of trial changed, on the ground of the convenience of witnesses, until he has filed an answer in the cause.

2. SAME—RIGHT OF SUBSTITUTED DEFENDANT.

A person who is substituted involuntarily as the sole defendant in place of the original defendant, under section 386 of the California Code of Civil Procedure, is entitled to demand and have a change of the place of venue to the county in which he resides.

Commissioners' decision.

Department 2. Appeal from superior court, county of Santa Clara.

*D. L. Smoot*, for appellant.

*Charles F. Wilcox*, for respondent.

FOOTE, C. The Stetefeldt Furnace Company had in its possession \$2,000, which John Howell and James M. Thompson respectively claimed. John Howell resided in Santa Clara county; the furnace company claimed to have its *situs* in San Francisco, and Thompson resided there. Howell brought suit in Santa Clara county against the furnace company to recover that sum of money. The company made no defense, but filed the necessary affidavit, under section 386, Code Civil Proc., gave the required notice to Howell and Thompson, paid the money into court, and obtained an order to be there made

and entered substituting Thompson in its place as defendant, and thereafter said company ceased to have any connection with the action. Upon Thompson being made the sole party defendant to the action, he filed a demurrer to the complaint, and at the same time, under section 396, Code Civil Proc., filed an affidavit of merits, and demanded in writing that the trial of the cause should take place in the county of San Francisco, where he resided. Notice of this motion was duly given by Thompson, and the motion denied by the court, from the order refusing which this appeal is taken.

It is contended on the part of the plaintiff, first, that so far as the defendant Thompson's right to a change of venue rested upon the claim that the convenience of witnesses required it, it should not be granted, because he had not filed an answer in the cause, and therefore the trial court was not placed in possession of the necessary facts to determine the propriety of granting the motion on that ground. And in this respect his contention is correct.

He claims further, however, that the defendant is not entitled to a change of venue to the county of his residence, because he did not move for or demand such change until after the court had obtained jurisdiction over the original defendant, and that it then became too late for the substituted defendant to rightfully claim such change.

The object had in view by the legislature in enacting section 396, Code Civil Proc., was to prevent trials of actions in counties other than those in which defendants resided, unless they waived such right. And the failure of the original defendant (even if it—a corporation—had possessed a residence, which it had not, as the term is used in sections 395, 396, Code Civil Proc.) to demand a change of venue to the county of its residence could not prejudice the right of a defendant, when upon his first appearance in the action, to which he had been made the sole substituted defendant *in invitum*, he moved for and demanded a transfer of the cause to the county where he resided. Thompson's first appearance in this cause as sole defendant was when he filed his demurrer to the complaint, and moved for and demanded a change of venue to the county of his residence. The appearance of the corporation was not his appearance. He was brought into the action, under section 386, Code Civil Proc., *in invitum*. He did not come in as a voluntary intervenor. From the moment he became such party to the action, and not until then, did he become entitled to the exercise of the right which accrued to him under section 396, Code Civil Proc. Therefore we are of opinion that the order of the court below should be reversed, and that tribunal directed to make and enter an order granting the change of venue as demanded.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the order is reversed, with directions to the court below to grant a change of venue.

(69 Cal. 184)

**PEOPLE v. MOODY and others. (No. 20,161.)**

Filed March 29, 1886.

**CRIMINAL LAW—INFORMATION, AMENDMENT OF—PLEA—ARRAIGNMENT.**

Where an information as filed, to which the defendants pleaded not guilty, stated no defense, for the reason that the day of the alleged commission of the offense was a day after the accusation was made, and after a jury was impaneled the information was amended by alleging the commission of the offense on a day prior to the filing of the information, the defendants should have been arraigned and called on to plead to the amended information, and it was error to proceed with the trial without an arraignment or plea to the information as amended.

In bank. Appeal from superior court, county of San Luis Obispo.  
*E. & William Graves and J. N. Turner*, for appellants.  
*E. C. Marshall*, Atty. Gen., for respondent.

MYRICK, J. The defendants were jointly prosecuted by information. The information was filed June 18, 1885, and accused the defendants of the commission of a crime on the twentieth of July, 1885, *a day subsequent to the filing*. The defendants were arraigned and pleaded not guilty. After a jury was impaneled the district attorney moved for leave to amend the information by charging the offense to have been committed July 20, 1884, *a day before the filing of the information*. Leave to amend was granted, and after amendment the trial proceeded without an arraignment and plea to the information as amended. Without passing on the power of the court to permit an amendment to an information, it is sufficient to say: The information as filed stated no offense for the commission of which the defendants could be tried, in that the day of the alleged commission of the offense was a day after the accusation was made; therefore no offense was charged. The information, when amended, charged an offense, and this information, so amended, could have been treated as an original information then for the first time presented. On this information the defendants should have been arraigned and called on to plead. This omission was error. No issue was joined as to any possible crime.

Judgment and order reversed, and cause remanded for proceedings not inconsistent with this opinion.

We concur: SHARPSTEIN, J.; ROSS, J.; MORRISON, C. J.; THORNTON, J.; MCKEE, J.

(89 Cal. 215)

## PEOPLE v. KEWEN. (No. 11,271.)

Filed March 30, 1886.

## UNIVERSITY OF CALIFORNIA—HASTINGS COLLEGE OF THE LAW.

The Hastings College of the Law was by the California act of March 26, 1878, affiliated with the university, and the California constitution of 1879, having declared that the university should be continued in the form and character prescribed in the acts then in force, it was not competent for the legislature, by the acts of March 3, 1883, and March 18, 1885, to change the form of the government of the university, or of any college thereof then existing, and those acts are therefore void, in attempting to provide for a mode of selection of directors for the law college different from that in existence.

In bank. Appeal from superior court, city and county of San Francisco.

*Ralph C. Harrison*, for appellant.

*Ryland Wallace and The Attorney General*, for respondent.

MYRICK, J. The organic act of the University of California (St. 1867-68, p. 248, § 1) made provision that professional and other colleges might be added to and connected with the university. The act of March 26, 1878, (St. 1877-78, p. 533,) creating Hastings College of the Law, made provision for its affiliation with the university. The petition in this case is based on the fact of such affiliation, and it was held by this court, in *Foltz v. Hoge*, 54 Cal. 28, (decided in 1879,) that the law college had affiliated with the university, and had become an integral part thereof, subject to the same general provisions of the law as were applicable to the university. The constitution of 1879 (article 9, § 9) declared that the university should be continued in the form and character prescribed in the acts then in force, subject to legislative control for certain specified purposes only. Such being the case, it was not competent for the legislature, by the act of March 3, 1883, or that of March 18, 1885, or by any other act, to change the form of the government of the university, or of any college thereof then existing. The act of 1878 provided for a board of directors, to consist of eight persons, naming the first and providing for the selection of successors; the act of 1883 assumed to transfer the control of the college to the regents of the university; and the act of 1885 assumed to make another transfer by creating a board of trustees for the college, to consist of three, naming them, and providing for the appointment of successors. It was intended by the constitution to prohibit such changes as to the university; and if the college is a portion of the university, such prohibition would extend to it. The selection of the respondent as registrar by the board of directors existing under the act of March 26, 1878, was therefore a legal selection, and he is rightfully in office until removed by that board.

Judgment reversed, and cause remanded, with directions to sustain the demurrer.

We concur: THORNTON, J.; MCKEE, J.

MCKINSTRY, J. I concur. Taking it for granted (as is assumed by the respondent) that, prior to the adoption of the present constitution of the state, the Hastings Law College had "affiliated" with the university, I agree that the attempted changes in its organization, by statutes passed after the constitution was adopted, were attempted changes in the "form and character" of the university, prohibited by article 9, § 9. In saying this, I neither take judicial notice of an affiliation, nor hold that the fact is, for all purposes, determined by *Foltz v. Hoge*, 54 Cal. 28; but rest my concurrence upon the failure of the complaint to aver that such affiliation had not taken place, and upon averments in the complaint which assume it, as well as on the express claim of counsel for respondent in their points and authorities.

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(2 Cal. Unrep. 660)

HOLMBERG v. HENDY. (No. 9,131.)

Filed March 31, 1886.

REFLEVIN—FORM OF VERDICT AND JUDGMENT.

In an action of claim and delivery, the verdict and judgment must be in the alternative, as provided by section 667 of the California Code of Civil Procedure.

Department 1. Appeal from superior court, Calaveras county.

Action for claim and delivery. The verdict and judgment were not in the alternative form, but merely for plaintiff for the sum of \$1,100, and interest.

*Wm. H. H. Hart*, for appellant.

*Ira H. Reed*, for respondent.

ROES, J. The action is claim and delivery. The judgment does not conform to the requirements of the statute in such cases, for which reason it must be reversed. Code Civil Proc. § 667; *Berson v. Nunan*, 63 Cal. 550. The verdict contains the same vice, for which reason a proper judgment could not be here ordered, assuming that none of the other points made by appellants are well taken. A new trial must therefore be ordered without reference to the other points.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRIOK, J.; MCKINSTRY, J.

LA SOCIETE FRANCAISE D'EPARGNE ET DE PREVOYANCE MUTUELLE v.  
FISHEL, Ex'x, etc., and others.

Filed April 2, 1886.

MUNICIPAL CORPORATIONS—SAN FRANCISCO—CONTRACT FOR STREET WORK—  
EXTENSION OF TIME—STREET ASSESSMENT.

The board of supervisors of the city and county of San Francisco cannot, after the expiration of the time for the completion of street work under a contract, extend the time; and any attempt to do so, or to validate an assessment for such work done in pursuance of an extension of time, is void. On authority of *Beveridge v. Livingstone*, 54 Cal. 54, and *Fanning v. Schammel*, 9 Pac. Rep. 427.

Department 2. Appeal from superior court, city and county of San Francisco.

Action to foreclose a street-assessment lien for street work done in the city and county of San Francisco. The work was to be done under contract, within a specified time. At the expiration of such time the work was still uncompleted. Subsequently the board of supervisors passed an order extending the time in which to complete the work. Judgment was rendered for defendant.

*J. M. Wood* and *Daniel Harney*, for appellant.

*Stanly, Stoney & Hayes*, for respondent.

BY THE COURT. The only point involved in this case was decided in *Beveridge v. Livingstone*, 54 Cal. 54, and in *Fanning v. Schammel*, 9 Pac. Rep. 427. Upon the authority of those cases the judgment is affirmed.

(69 Cal. 155)

COLTON v. ONDERDONK and others. (No. 9,130.)

Filed March 26, 1886.

1. TRESPASS TO REALTY—ACTION BY DEVISEE IN POSSESSION.

A devisee of land, in possession thereof pending the settlement of the testator's estate, may, after the death of the testator, maintain an action for the recovery of damages for a trespass to such land.

2. SAME—TRESPASS TO DECEDENT'S REALTY—RESPECTIVE RIGHT OF EXECUTOR OR DEVISEE IN POSSESSION TO SUE.

If a devisee of land, in possession thereof pending the settlement of the estate of the testator, be also the executrix of the testator's will, a recovery in an action by her, in her own name, is a bar to her recovery for the same cause of action in her capacity as executrix.

3. SAME—BLASTING BY GUNPOWDER AS TRESPASS.

One who owns a lot, situated in a large city, and adjoining the dwelling of another, and uses large quantities of gunpowder to blast out rock on his lot, is responsible for the damage done to such dwelling as the natural and proximate result of his blasting, such blasting being taken as an unreasonable, unusual, and unnatural use of his own property; and he cannot excuse himself from liability for such use of his property by showing any degree of care or skill.

Commissioners' decision.

<sup>1</sup> See modification of opinion, *post*, 398.

Department 2. Appeal from superior court, city and county of San Francisco.

*Fox & Kellogg*, for appellants.

*Crittenden Thornton* and *Stanly, Stoney & Hayes*, for respondent.

FOOTE, C. The plaintiff instituted this action for the recovery of damages which she claimed the defendant had caused to her dwelling-house while he was engaged in blasting rock, in grading another lot adjoining that on which the plaintiff's dwelling stood. The cause being tried by a jury, their verdict was in favor of Mrs. Colton for \$7,500. This was on the nineteenth of March, 1883. Afterwards, on the nineteenth of June, 1883, a judgment thereon was rendered for the sum of \$7,631.25, and interest from said date at 7 per cent. per annum, together with costs and disbursements in the sum of \$464.45. From said judgment and an order refusing his motion for a new trial the defendant appeals.

His first contention is that the complaint showed no cause of action, because, as he claims, it is doubtful whether the plaintiff claims to have been in possession of the damaged house as devisee under her husband's will, or as executrix; and by the allegations of that pleading that the decedent's estate not having been distributed, the executrix alone could sue in such an action, and not having done so, no recovery could legally be had. We do not think this proposition is successfully maintained. The complaint, as we think, in its statements, conveys to the ordinary intellect that Mrs. Colton claimed damages from the defendant for injuries done to the dwelling-house of which she was in possession as a sole devisee under her husband's will, and the further fact that she was also the executrix of that will. There was a statement therein that the defendant had damaged the property of which she, Ellen M. Colton, in her own proper person, was in possession, which was the gist of the action, and no contradiction of that statement. Therefore the case of *Dickinson v. McGuire*, 9 Cal. 46, cited by the appellant, is not in point. And if it was ambiguous or doubtful from the language of the pleading what it meant to convey as to the capacity in which Mrs. Colton sued, that should have been taken advantage of by special demurrer, and such course not having been taken, the defect was waived. Code Civil Proc. § 434.

At common law the right of action in such a case as this—trespass upon realty—was in the heir or devisee in possession. Pom. Rem. (2d Ed.) § 219; Wat. Tresp. 979, 980; *Lyman v. Webber*, 17 Vt. 489; *Aubuchon v. Lory*, 23 Mo. 99, 100; *Railroad Co. v. Knapp*, 51 Tex. 576, 577.

It is true that in California the administrator or executor is entitled to the possession of the real estate of his decedent for certain purposes, even as against the heir or devisee; but the title to the land is vested in the latter subject to the former's lien for the payment of

debts and the expenses of administration. *Estate of Woodworth*, 31 Cal. 604. Under sections 1452, 1581, Code Civil Proc., the possession of an executor is that of the heir or devisee, and, as against third persons, the latter can maintain an action of ejectment as well as the former. The defendant is a mere trespasser upon the rights of one in possession of the realty against whom he does not attempt to assert any paramount title; therefore she, being in possession, can institute the action. *Polk v. Henderson*, 9 Yerg. 310; *Darling v. Kelly*, 113 Mass. 29-31; *Sweetland v. Stetson*, 115 Mass. 49, 50; *Kilborn v. Rewee*, 8 Gray, 415-417.

But it would make no difference to the defendant's rights how she, the plaintiff, sued,—whether as executrix or universal devisee,—as a judgment in her favor for damages to the dwelling while in her possession as such devisee would be a bar to her recovery for the same cause of action in the capacity of executrix. *Stewart v. Montgomery*, 23 Pa. St. 412; *Atherton v. Atherton*, 2 Pa. St. 112. And as to what she might do with the money recovered in this action, in accounting to the probate court, is no concern of the defendant, a mere trespasser, and not a creditor of her decedent's estate; as, having once paid the amount recovered by her in the capacity in which she sued, his responsibility would cease.

The allegations, therefore, of the complaint, which are admitted by the answer to be true, that the plaintiff, Ellen M. Colton, at the time the trespass complained of was committed by defendant was entitled to and in possession of the premises as the owner thereof in fee since the death of her husband, David D. Colton, taken with the other facts set out therein, sufficiently stated a cause of action. The fact that the defendant used quantities of gunpowder, a violent and dangerous explosive, to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house as the natural and proximate result of his blasting; for an act which in many cases is in itself lawful, becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling-house, or a concussion of the air around it, which had either damaged or entirely destroyed it.

The defendant seems, by his contention, to claim that he had a right to blast rocks with gunpowder on his own lot, in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken. Add. Torts. 9; *Transportation Co. v. Chicago*, 99 U. S. 635-

644; *Losee v. Buchanan*, 51 N. Y. 479, explaining *Hay v. Cohoes Co.*, 2 N. Y. 159-162; *Pixley v. Clark*, 35 N. Y. 520-532; *Heeg v. Licht*, 80 N. Y. 579-583; *Tiffin v. McCormack*, 34 Ohio St. 644; *Carman v. Railroad Co.*, 4 Ohio St. 417, 418; *Sutton v. Clarke*, 6 Taunt. 44; *Joliet v. Harwood*, 86 Ill. 110-116; *Farrand v. Marshall*, 19 Barb. 381-385; *Selden v. Canal Co.*, 24 Barb. 363, 364; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Wilson v. New Bedford*, 108 Mass. 261-266; *Skipley v. Fifty Associates*, 106 Mass. 194-200; *Ball v. Nye*, 99 Mass. 582-584; *Cahill v. Eastman*, 18 Minn. 324, (Gil. 299;) S. C. 10 Amer. Rep. 184-200.

The plaintiff being in possession as the sole devisee under her husband's will, and the owner in fee, was entitled to recover as damages a sufficient sum of money to restore her dwelling-house, as far as practicable, to the condition in which it had been prior to the injury inflicted by the defendant's acts. 2 Wat. Tresp. § 1093. We think, however, that the judgment was excessive, being for \$131.25 more than the verdict of the jury; and therefore should be modified so as to have judgment rendered for the plaintiff for the sum of \$7,500 and costs. The case should therefore be remanded to the court below, with directions to modify its judgment in accordance with the views we have herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to modify its judgment in accordance with the views expressed in said opinion.

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(69 Cal. 155)

COLTON v. ONDERDONK. (No. 9,130.)

Filed April 2, 1886.

OPINION MODIFIED.<sup>1</sup>

Department 2. Appeal from superior court, city and county of San Francisco.

*Fox & Kellogg*, for appellant.

*Crittenden Thornton* and *Stanly, Stoney & Hayes*, for respondent.

MYRICK, SHARPSTEIN, and MCKEE, JJ. On motion of Stanly, Stoney & Hayes, for respondent, and good cause appearing therefor, it is ordered that the judgment heretofore rendered and entered in the above-entitled action be amended so as to read as follows: The order denying defendant's motion for a new trial is affirmed, and the cause is remanded to the court below, with directions to modify the

<sup>1</sup>See *ante*, 395.

judgment by striking out the damages thereby awarded, and inserting instead thereof the sum of \$7,500. In other respects the judgment is affirmed.

(69 Cal. 223)

MARSHALL, Atty. Gen., and another v. DUNN, Comptroller. (No. 11,192.)

Filed March 30, 1886.

STATE OFFICERS—TRAVELING EXPENSES OF STATE OFFICERS—MANDAMUS.

*Mandamus* does not lie to compel the comptroller of the state of California to draw warrants in favor of the attorney general and the surveyor general, for traveling expenses, during the thirty-fifth fiscal year, in contests about public lands between the state and the United States, (under the California statute of March 9, 1883, appropriating \$1,000 for the payment of such expenses, but providing that not more than half such sum should be expended during the thirty-fifth fiscal year,) if the fund specifically appropriated for the purpose of such expenses during such year, viz., \$500, has already been expended when the demand is made on the comptroller for the warrant.

In bank. Appeal from superior court, county of Sacramento.

E. C. Marshall, for appellant.

R. T. Devlin and R. M. Clarken, for respondent.

McKINSTRY, J. This is an appeal from a judgment in *mandamus* of the superior court of Sacramento county, denying the plaintiffs' petition that defendant be commanded to draw warrants in favor of plaintiffs for traveling expenses when engaged in contests about public lands between the state and the United States. The complaint is as follows:

"And now comes E. C. Marshall, attorney for plaintiffs herein, and respectfully moves this honorable court to issue its mandate against the defendant, J. P. Dunn, state comptroller, commanding him to issue his warrants against the treasury of said state, as follows: In favor of said petitioner H. I. Willey, surveyor general, in the sum of \$250, and in favor of said petitioner E. C. Marshall, attorney general, in the sum of \$750, in payment of accounts of said plaintiffs, as allowed by the state board of examiners on the seventh day of April, 1884, in pursuance of section 3413 of the Political Code of California. The legislature of the state of California, by an act entitled 'An act making appropriations for the support of the government of the state of California for the thirty-fifth and thirty-sixth fiscal years,' approved March 9, 1883, and found in the statutes of 1883, pages 12 and following, made the following appropriations: For traveling expenses of the surveyor general and the attorney general, when engaged in contests between the state and the United States about public lands, one thousand dollars. That warrants have been duly drawn by the defendant, J. P. Dunn, as comptroller aforesaid, during the thirty-fifth fiscal year, against said sum of \$1,000, in favor of said plaintiff H. I. Willey, surveyor general, amounting to the sum of \$500; that by section 4 of the act of March 9, 1883, it is provided that not more than one-half of any sum appropriated under this act shall be expended during the thirty-fifth fiscal year, unless such sum is exempted from the operation of this section; that the services of plaintiffs were rendered during the thirty-fifth fiscal year, and the appropriation made by the said act of March 9, 1883, has been drawn upon for the sum of \$500; that there is of the appropriation of \$1,000 remaining the sum of \$500, against which no warrants have been

drawn; that the legislature has made no appropriation since March 9, 1883, for the payment of the traveling expenses of the plaintiffs in this action, nor does any appropriation for that purpose exist other than the said act of March 9, 1883, and that found in the section 3413 of the Political Code."

The only appropriation relied on by the plaintiffs is found in the act making appropriations for the support of the government for the thirty-fifth and thirty-sixth fiscal years, approved March 9, 1883: "For traveling expenses of the surveyor general and attorney general when engaged in contests between this state and the United States about public lands, one thousand dollars." By section 4 of that act it was provided that "not more than one-half of any sum appropriated under this act shall be expended during the thirty-fifth fiscal year, unless such sum is exempted from the operation of this section."

Warrants were drawn by the defendant, as comptroller, against the \$1,000 appropriation, in favor of the plaintiff the surveyor general, amounting to \$500 during the thirty-fifth fiscal year. The traveling of the plaintiffs, the expenses of which are involved in this proceeding, was done during the thirty-fifth fiscal year, and the statute does not exempt the \$1,000 appropriation from the operation of the fourth section. No question arises here with respect to the relative rights of the plaintiffs. Both join in this application.

"It is the duty of the comptroller \* \* \* to draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law, and upon an *unexhausted, specific appropriation* provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof." See *Stratton v. Green*, 45 Cal. 151; Pol. Code, § 433.

Here the fund specifically appropriated for the traveling expenses of the plaintiffs during the thirty-fifth fiscal year had already been exhausted, when the demand was made on the comptroller for a warrant, and when this proceeding was commenced. Judgment affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.; ROSS, J.; McKEE, J.; THORNTON, J.

(69 Cal. 247)

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ROSS v. SEDGWICK. (No. 9,052.)

Filed March 31, 1886.

1. SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.

Where the keeper of a lodging-house was notified by her landlord that she must leave the premises by a certain time, and she failed to do so; whereupon he sued her and obtained judgment of restitution, and for treble rent against her; and about the time of said judgment, but before execution, she transferred the furniture in said lodging-house to her brother in payment of an actual indebtedness to him, and gave him a bill of sale therefor; whereupon

he took possession, and exercised control over the property, taking up his abode in said lodging-house, and notifying the lodgers that he had bought the property,—it was *held*, that there was such an actual and continued change of possession of the property as would vest the title in him, notwithstanding the possession of the house could not be transferred, and was still in the vendor of the property.

**2. FRAUDULENT CONVEYANCE—PREFERENCES.**

A transfer of property by a debtor to one of his creditors, giving the latter a preference over other creditors, is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts; for to avoid the transfer there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts.<sup>1</sup>

**3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.**

To entitle a party to a new trial on the ground of newly-discovered evidence, he must show diligence in endeavoring to discover and produce the evidence on the former trial. A general averment is not sufficient, but he must state particularly what acts he performed to enable the court to decide what diligence he used; and if no such facts are shown, and every material fact disclosed by affidavit is contradicted by counter-affidavits, a new trial is properly refused.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

*Geo. D. Shadburne*, for appellant.

*Severance, Travers & Hornblower*, for respondent.

**BELCHER, C. C.** This was an action to recover damages for the conversion by the defendant of certain household furniture, alleged to be the property of the plaintiff. The defendant justified the taking of the furniture upon the ground that he was sheriff of the city and county of San Francisco, and as such seized the property and sold it under an execution issued against one Annie P. Vallean, whose property he alleged it was at the time of such seizure. The case was tried before a jury, and the verdict was in favor of plaintiff. The appeal is by the defendant from the judgment and an order denying a new trial. The record shows that Mrs. Vallean was the keeper of a lodging-house in the city of San Francisco, for which she had been paying a monthly rental of \$65. The landlord notified her to leave the premises, and that her rent would be raised to \$100 per month. He commenced an action to remove her from the premises, and on the eleventh of September, 1882, obtained a judgment of restitution, and for \$300, treble rent for one month, and for costs. About this time she notified the plaintiff, who was her brother, and lived in the country, that she was in trouble, and wanted him to come down and help her. He came to the city on the fifteenth of September, took a room in the lodging-house, and remained there until the twenty-fifth of the month. On the 20th he took an inventory of all the furniture in the house, and then exacted, and Mrs. Vallean gave him, a bill of

<sup>1</sup> For a full discussion of the question of fraudulent conveyance, see *Lewin v. Hopping*, (Cal.) 3 Pac. Rep. 73, and note, 75-82.

sale of it. She was indebted to him at the time in a sum equal to the value of the furniture, and the sale was made in payment of that indebtedness. He at once took possession of the property, notified the lodgers in the house that he had bought it, and continued to exercise control over it until it was seized by the defendant. Mrs. Valleau engaged a room for herself in another house, but became ill, and was unable to leave the lodging-house until the early morning of the 25th, when she went away, taking some of her personal effects with her. On the afternoon of the 25th a deputy-sheriff under the defendant went to the lodging-house, and levied an execution, issued on the judgment above referred to, upon all the furniture which he found therein. The plaintiff was there, and, before the levy was made, notified the deputy that the property was his. After due notice the furniture was sold by the defendant under the execution.

At the trial the principal contention on the part of the defendant was that the sale by Mrs. Valleau to the plaintiff was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold; and it is now claimed that the evidence was insufficient to justify the verdict, and that the judgment should therefore be reversed.

We do not think this claim can be maintained. The case was submitted to the jury under instructions which stated the law upon the question involved very clearly, fully, and correctly; and, looking now at all the testimony, we are unable to say that there was not a sufficient change of possession to meet the requirements of section 3440 of the Civil Code. It is true that after making the bill of sale Mrs. Valleau remained for a time in the house, but she had surrendered all control, and was sick, and most of the time in bed. The plaintiff had assumed control, and his possession was open, visible, and notorious.

The defendant asked the court to instruct the jury, in effect, that a tenant holds possession of leased premises for his landlord, and that after the landlord has obtained a judgment against his tenant for the possession of the premises the tenant cannot induct another into the possession thereon, and thereby create the relation of landlord and tenant between either himself and such person or his landlord and such person; hence any possession by plaintiff of the lodging-house, after the judgment against Mrs. Valleau, was unlawful, and the possession was Mrs. Valleau's until the premises were delivered to her landlord, "and the possession of the furniture in the house—a part of such real property—could not be transferred to any one by the delivery of the possession of the house to such person, and such a transfer would be void as to creditors." The instruction was properly refused. If given, it would have tended to mislead the jury. The plaintiff was not claiming the possession of the furniture because of the delivery to him of the possession of the house. He claimed to have taken the *actual* possession of the furniture, and this he might

have done notwithstanding, as matter of law, the possession of the house remained in Mrs. Valteau.

The defendant also asked the court to instruct the jury as follows :

"Every transfer of property made with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor; hence if from the evidence you should believe there was such a transfer of the property in question to the plaintiff, although the plaintiff might have been in possession thereof at the time of the seizure of the same by defendant, still you should find for defendant."

The court properly refused to give this instruction. It appeared from the testimony—and there was no conflict—that the furniture was conveyed to the plaintiff in payment of a just indebtedness from Mrs. Valteau to him. He had a right to exact the payment of his debt, and the transfer was not made void, under section 3439 of the Civil Code, though he knew that other creditors would thereby be hindered and delayed in the collection of their debts. As said in *Dana v. Stanford*, 10 Cal. 278 :

"A conveyance giving such preference is not fraudulent, though the debtor be insolvent, and the creditor be aware, at the time, that it will have the effect of defeating the collection of other debts. To avoid the conveyance there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims."

See, also, *Randall v. Buffington*, 10 Cal. 491; *Wheaton v. Neville*, 19 Cal. 46; *Covanhovan v. Hart*, 21 Pa. St. 495.

There was no error in refusing to grant the motion for a new trial on the ground of newly-discovered evidence. No reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced at the trial. To entitle one to relief in such a case, strict proof of diligence is required, "and a general averment of diligence is not sufficient. He should state particularly what acts he performed, in order that the court may decide whether proper diligence was used." *Butler v. Vassault*, 40 Cal. 76. Besides, nearly every material fact disclosed by the affidavits is contradicted by counter-affidavits.

We discover no error in the record, and the judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 650)

**SANTA CRUZ GAP TURNPIKE JOINT-STOCK CO. v. BOARD OF SUP'RS OF SANTA CLARA. (No. 9,235.)**

Filed April 2, 1886.

**TOLL-ROAD—MANDAMUS—DEMURRER TO PETITION.**

Where an application is made to a superior court for a writ of mandate to compel the board of supervisors of a county to locate toll-gates and to fix rates of toll on a certain road which it is claimed in the petition the corporation petitioner had a right to collect tolls upon, the superior court is in error if it sustains a demurrer to such petition on the ground that it does not appear therefrom that the petitioner had or owned any road, or right of way for a road, as such a petition states, sufficient to entitle the petitioner to relief

Department 2. Application for a writ of mandate.

*S. O. Houghton*, for appellant.

*J. H. Campbell* and *S. F. Leib*, for respondent.

By THE COURT. This was an application to the superior court of the county of Santa Clara for a writ of mandate to compel the board of supervisors of that county to locate toll-gates and to fix rates of toll on a certain road which it was claimed the corporation petitioner had a right to collect tolls upon. An order was made requiring the respondent to show cause why the writ should not issue. The respondent moved to quash the petition upon the ground that it did not appear that the petitioner had or owned any road or right of way for a road. The court treated the motion as a demurrer and sustained it, and the petitioner declining to amend, judgment was entered denying the application. We think the court erred in its ruling. Looking at the whole petition we think it states all the facts necessary to entitle the petitioner to the relief demanded. The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(69 Cal. 186)

**SWAIN and others v. GRANGERS' UNION OF SAN JOAQUIN VALLEY. (No. 8,174.)**

Filed March 29, 1886.

**CONTRACT—WRITTEN AGREEMENT TO PAY INDEBTEDNESS—PAROL EVIDENCE TO VARY.**

Under a written contract providing for the payment of all the present and future indebtedness of another, parol evidence is inadmissible to show that a certain existing debt was not intended to be included; and the meaning of the words "all indebtedness, present and future," is not a question for the jury, but is a matter of law for the court.

In bank. Appeal from superior court, county of Stanislaus.

*Terry, McKinne & Terry* and *Johnson & Hazen*, for appellant.

*W. E. Turner*, for respondents.

THORNTON, J. The court erred in allowing the following question put to Swain, one of the plaintiffs, when called as a witness: "At the time this contract was executed, what indebtedness was referred to

by the parties when they speak of all indebtedness, present and future?" It also erred in admitting the answer of Swain.

The written contract stated the *indebtedness* referred to as "present and future." It could not be stated more plainly. Why, then, allow the question? The question permitted the witness to state what indebtedness was referred to. The writing fixed the indebtedness signified. To allow the witness to say that this indebtedness, existing or future, was referred to, and that was not, would be to allow him to alter the express terms of the contract. This clearly appears from the answer of the witness, for he testified that an indebtedness plainly existing when the contract was executed, was not referred to. We cannot conceive of a more plain infraction of the rule that the terms of a written agreement shall not be altered by parol testimony.

The following testimony of the secretary of defendant should also have been excluded:

"When we first entered into negotiations with the plaintiffs, and we signed Exhibit A, it was not understood that, before we would turn over this store and stock in trade to them as their own, they should pay us this \$6,000 note. There was no such understanding. The understanding was that, when they paid this \$2,600, which we had assumed, and pay for what amount of goods we had furnished up to that time, then we were to turn over everything to them. That was the understanding up to the time this contract [Exhibit A] was signed."

The court also erred in directing the jury that the written contract was so far ambiguous and uncertain that they must find from the testimony what indebtedness was meant by the words "all indebtedness, present and future." We see nothing ambiguous or uncertain in the words above mentioned. Their meaning was a question of law for the court, and not a question of fact to be determined by the jury. The direction left to the jury a question of law, which was plain and manifest error.

Witnesses may be allowed to testify what indebtedness, as a fact, existed when the written contract was made, and what, as a matter of fact, accrued after that date. But the meaning of the words employed in the contract and selected by the parties to express their intention was a question of law for the court only. The oral evidence thus indicated as admissible, is let in to show *the subject-matter of the written agreement*, and for this purpose is proper. 1 Greenl. Ev. §§ 287, 288.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; SHARPSTEIN, J.; MCKEE, J.; MORRISON, C. J.

MCKINSTRY, J. I concur. If the broadest view be adopted with respect to the admissibility of evidence of the circumstances surrounding the parties, or contemplated by them when a contract is entered into, the witness ought not to have been permitted to state what, in his judgment, was the result of the circumstances; or that, in his opin-

ion, they limited or changed the language of the written contract. Nor was this evidence of a usage or custom; or that language, unambiguous in itself, was, in the presence of such usage or custom, used in a peculiar sense, or bore a signification differing from that which it would ordinarily import.

(69 Cal. 195)

SKINNER v. HALL and others. (No. 8,456.)

Filed March 30, 1886.

**HOMESTEAD—DECLARATION—RESIDENCE.**

A declaration of homestead may legally be made upon property on which the declarant's actual residence has been for one day only, or on property which is partially rented out or used for purposes other than a residence. Evidence in this case reviewed, and *held*, that plaintiff was an actual resident on his property at the time of filing his declaration, so as to constitute the homestead valid.<sup>1</sup>

Commissioners' decision.

Department 2: Appeal from superior court, county of Santa Clara.

*William B. Hardy and James R. Lowe*, for appellants.

*J. C. Black*, for respondent.

BELCHER, C. C. This action was commenced to restrain the sale of a lot of land in the city of San Jose under executions issued upon judgments against the plaintiff. The plaintiff claimed that when the executions were levied, the lot was his homestead, and therefore not subject to forced sale. The defendants denied that it was a homestead, and whether it was or not is the only question presented for decision.

The court found that on the fifteenth day of October, 1879, the plaintiff resided with his family, consisting of his wife and one child, in a dwelling-house on the lot, and on that day made and caused to be recorded a declaration, in proper form, claiming it as a homestead. On the sixth of December following, his house was partially burned, and more than half of his furniture was destroyed. Immediately after the fire, he went with his wife and child, to the house of his mother, on the adjoining lot, where it was agreed that he should pay for his board, and his wife should assist in the housework as a compensation for her board and that of the child. He proceeded to repair his house, and the repairs were completed in the month of May, 1880. After making the repairs he had not the means to refurnish the house; and that he might raise money to purchase the necessary furniture, he rented the house and lot by the month, for the monthly rental of \$15. The tenant entered into possession, and continued to occupy the premises until May, 1881. When he filed his declara-

<sup>1</sup> To constitute a valid homestead under the California law existing in 1869, as well as under the present existing law, claimant must actually reside on the premises at the time of filing the declaration. *Pfister v. Dascev*, (Cal.) 10 Pac. Rep. 117.

tion of homestead in October, 1879, he owned the undivided half of the lot and of the adjoining lot where his mother lived, and she owned the other undivided half of the two lots. Between the month of May, 1880, and the twenty-fourth of January, 1881, he exchanged conveyances with his mother, and thereby acquired the title to the whole of the lot on which his house stood. On the last-named day he made an arrangement with his tenant, by which he gave up a part of the rent, and was permitted to occupy the front room of the house; and on the night of that day he took to the room some bedding and slept there. He continued to sleep in the room until May, when the tenant gave up the house, and his wife and child joined him, and occupied the same room with him after the fifteenth of February. On the twenty-fifth of January, 1881, he and his wife executed an abandonment of their homestead on the lot, and thereafter, on the same day, he executed a new declaration of homestead thereon. Both papers were then filed for record in the recorder's office,—the abandonment at 10 minutes, and the new declaration at 15 minutes, after 10 o'clock A. M. The abandonment was not made with any intention on the part of the plaintiff or his wife of abandoning the premises as their home and residence, but for the purpose of facilitating, as he believed, the division of the property held in common by him and his mother, and with the intent to immediately refile another declaration of homestead thereon. The lot had a frontage of 62 feet and a depth of  $137\frac{1}{2}$  feet. A board fence extended back from the front through the middle of the lot, a distance of 95 feet, and all back of that was inclosed in a poultry yard. The dwelling-house and out-buildings were on the north 31 feet front, and no improvements, except the fence surrounding it and the cross-fence of the poultry-yard, were on the south half of the lot. The value of the premises did not exceed the sum of \$3,000.

Upon these facts the defendants contended that there was no homestead, because the old homestead was abandoned, and the plaintiff was not residing on the premises when he filed his new declaration of homestead. The court, however, thought otherwise, and rendered judgment for the plaintiff. The appeal is from the judgment, and rests upon the judgment roll.

A homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as provided in the Civil Code. Section 1237, Civil Code. The declaration of homestead must contain, among other things, a statement that the person making it is residing on the premises, and claims them as a homestead. Section 1263, Civil Code. To constitute a valid homestead the claimant must *actually* reside on the premises when his declaration is filed. *Aucker v. McCoy*, 56 Cal. 524.

Was the plaintiff actually residing on the premises in question when his declaration was filed? After carefully considering the findings we are unable to say that he was not. Conceding, as claimed for the

appellants, that he went back to the house for the purpose of qualifying himself to file a new declaration, still it does not follow that his residence was not *actual*. He had taken up his abode in the house, and had slept there one night. His wife and child did not go with him, but it was not absolutely necessary that they should. One may have an actual residence in a house, though his family be away, and he take his meals elsewhere. Nor is the fact that he had slept there but one night, decisive of the question. After making an actual residence upon property, one may file a homestead upon it at the end of a day, as well as at the end of a month or a year. So one may file and maintain a homestead upon property which is partially rented out, or used for other purposes than his residence. *Ackley v. Chamberlain*, 16 Cal. 181; *Phelps v. Rooney*, 9 Wis. 70.

It is also claimed for the appellants that the south half of the lot, back as far as the poultry-yard fence, was not impressed with the character of homestead, and, to that extent at least, the court erred in its conclusions. As has been seen, the whole lot was but 62 feet wide, and was all inclosed. It was divided by a fence running back to the poultry yard, and the house and out-buildings were upon the northern half. Still the court thought it all constituted the homestead and was exempt from forced sale, and we cannot say its conclusions were not justified by the facts.

On the whole, we think the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

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(69 Cal. 207)

SAYRE v. CITIZENS' GAS-LIGHT & HEAT Co. and others. (No. 8,785.)

Filed March 30, 1886.

JUDGMENT AFFIRMED.

In bank. Appeal from superior court, city and county of San Francisco.

*George Caawalader and G. E. R. Hayes*, for appellant.

*McAllister & Bergin*, for respondent.

MYRICK, J. An opinion was filed by the court, in department, June 23, 1885. 7 Pac. Rep. 437. After hearing by the court in bank, we are satisfied of the correctness of the views expressed in that opinion. As to other points presented, but not referred to in the opinion, we will say we see no error. The court was correct in the views that the act of March 26, 1866, authorized an assessment on full-paid stock. The contract between Morris, the assignor of the plaintiff, and the Citizens' Gas-light & Heat Company did not call for unas-

sessable stock, even if it should be conceded that under the laws of this state a corporation is authorized to issue stock upon which no assessment can be levied.

The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; MORRISON, C. J.; ROSS, J.; MCKINSTRY, J.; MCKEE, J.

(68 Cal. 217)

CROSS, Adm'r, v. KITTS. (No. 9,544.)

Filed March 30, 1886.

1. GRANT—GRANT OF PERCOLATING WATERS.

Percolating waters, collected or gathered in a stream running in a defined channel, are such property or incidents thereof as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful acts of another.

2. SAME—GRANT OF LAND—EASEMENT PASSES BY.

An easement of receiving waters passes by a grant of land to which the easement is incident.

In bank. Appeal from superior court, county of Nevada.

*H. V. Reardon*, for appellant.

*C. W. Kitts*, for respondent.

MCKEE, J. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to quiet title to a water-right described in the complaint, and to enjoin the defendant from asserting any title to the water adverse to the plaintiff. The judgment was entered upon a decision given in writing and filed under sections 632 and 633, Code Civil Proc. On this appeal from the judgment the plaintiff in the action contends that he was entitled to judgment upon the decision, and that is the question. According to the decision, J. C. Gillespie was formerly the owner and in possession of a gravel claim known as the "Gillespie Claim," which adjoined a gravel claim known as the "Shanghai Claim," situated at the head of Gold Flat, in Nevada county. The Gillespie claim was excavated by a tunnel 200 feet long, known as the "McCormick Tunnel;" the ground at the entrance of which had caved, so that "no water, perceptible upon the surface, issued out of it;" and Gillespie, at or near to its entrance, made an open cut, from the front, bottom, and sides of which water percolated and collected "in such quantity as to form a running and defined stream of about two inches, miners' measure." This water came from near the inner end of the tunnel on or near the dividing line between the Gillespie and the Shanghai claims, and "where the bed rock pitched down into a low channel or basin." That was the condition of the Gillespie claim in the year 1864, when Gillespie, being in possession as owner, sold, and by deed transferred, to one A. D. Rich the right to the

water issuing from the tunnel in the claim, by the following description:

"That certain spring of water now issuing from the head of an open cut run by said Gillespie in the diggings of said Gillespie,—said diggings being at the head of Gold Flat, in Nevada township, Nevada county, state of California, and adjoining the Shanghai diggings on the west, and all waters now issuing or to issue from said spring, with the right and privilege to run another and deeper cut, or a tunnel, or cut and tunnel, to said spring, over and through the said diggings of Gillespie, and a right of way and easement to construct said cut or tunnel, and divert, manage, and control said waters, and make repairs, lay pipes and boxes, and convey and direct said water. The point from which said cut or tunnel is to be run to be the point on said Gillespie's diggings where the north-west corner of the said Shanghai diggings touches the diggings of said Gillespie."

When A. D. Rich acquired the water-right described in his deed, he and J. C. Rich were tenants in common of the Shanghai claim, adjoining the Gillespie claim, and of a parcel of property near to the two claims known as the "Half-mile House." There were two springs of water upon the Shanghai claim, and the proprietors of the Half-mile House brought the water from those springs, and from the spring issuing from the head of the open cut at the entrance of the tunnel in the Gillespie claim, by means of ditches, boxes, and pipes, down to their property for domestic use and irrigation; and in that manner they continued to use and enjoy the water from those sources until the year 1872, when they sold and conveyed the Half-mile House property to one G. M. Smith. The finding of the court is: "That said Half-mile House was by J. C. and D. A. Rich sold to G. W. Smith in 1872, and in the deed conveying the same several water-rights were described, and among them the following: 'Also that certain other water-right, situate in said township and county, consisting of a spring, and the waters arising therefrom, situate and being upon the Shanghai mining claim, formerly owned by Prior and Madison, on Gold Flat, in the ranch of Gillespie, together with all flumes and ditches used to divert and convey the waters of said spring to the lot and premises herein first conveyed.' And all the water-rights mentioned in the respective deeds from Rich & Rich to Smith \* \* \* were likewise used at and appurtenant to said Half-mile House property at the time of the conveyance thereof to Smith."

As administrator of the estate of T. W. Sigourney, deceased, the plaintiff in the action derives title to the Half-mile House property, by mesne conveyances from Smith and A. D. and J. C. Rich. Sigourney died in 1880 seized and possessed of the property. From the year 1873, the date of his acquisition of title, until the time of his death, he occupied the property, and used and enjoyed the water appurtenant to it, to the same extent that his grantors, immediate and remote, had used and enjoyed it, except that some changes were made in the use, necessitated by the working of the gravel claims in which the springs were located; but the right of Sigourney to the water from

the McCormick tunnel in the Gillespie gravel claim was never questioned in his life-time. In fact, it was always admitted by the owners and workers of the claim. But in the year 1881, Kitts, defendants in the action, acquired the title of the Gillespie gravel claim, and, in working the claim by the hydraulic process, they mined away a portion of the McCormick tunnel, and stopped the waters from flowing into and through the Sigourney flume to the Half-mile House property, claiming that the water in the tunnel was their property.

The court decided in favor of defendants, holding, as matter of law, "that neither the plaintiff nor the plaintiff's intestate ever had or now has any estate, right, title, or interest whatever in the said \* \* \* mining claim, and the said plaintiff does not now have, and did not have at the time of the commencement of this action, any right, title, or interest whatever in any water or water-right therein or thereon, or the right to take water flowing therefrom; and that said defendants \* \* \* are the sole owners of all waters flowing from said mining claim and are entitled to the use and possession thereof; that they have the right to mine and work their said claims, and to divert, appropriate, and use all water that may be found therein that may flow therefrom."

The conclusion that the plaintiff had no right in or to receive the water flowing from the McCormick tunnel is not well drawn from the findings. The right in, and the right of receiving, the water (section 801, Civil Code) passed by the deed of Gillespie in 1864 to A. D. Rich, and all the actual title to the Half-mile House property passed from A. D. and J. C. Rich and their grantees by the mesne conveyances under which Sigourney derived the title. The right to the water from the McCormick tunnel, therefore, passed as an incident to the Half-mile House property. Section 1084, Civil Code; *Sparks v. Hess*, 15 Cal. 186; *Cave v. Crafts*, 53 Cal. 135. A transfer of real property, says the Code, passes all easements attached thereto, and creates, in favor thereof, an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. Section 1104, Civil Code. But the decision that the defendants, as owners of the Gillespie gravel claim, had the superior right to the water, seems to have for its basis the fact found by the court "that all the water that ever flowed through the McCormick tunnel was percolating water gathered from the ground through which said tunnel was run;" but the court also found as a fact that the water "percolated and collected in such quantity as to form a running and defined stream of about two inches, miners' measure."

There is no doubt that percolating water existing in the earth is not governed by the same laws that pertain to running streams. Water percolating in the soil belongs to the owner of the freehold

"Each owner," says the supreme court of Connecticut, "has an equal and complete right to the use of his land, and to the water which is in it. Water combined with the earth, or passing through it, by percolation or filtration, or chemical attraction, has no distinctive character of ownership from the earth itself, any more than the metallic oxides of which the earth is composed. Water, whether moving or motionless *in the earth*, is not, in the eye of the law, distinct from the earth." *Roath v. Driscoll*, 20 Conn. 540. See, also, *Hanson v. McCue*, 42 Cal. 303; *Ballard v. Tomlinson*, 24 Amer. Law Reg. 636. But where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land. They are such property, or incidents to property, as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful acts of another. In *Brown v. Ashley*, 16 Nev. 317, it was held that rights in water coming from a spring by percolation are acquirable by prior appropriation, and the appropriator cannot be divested of them by a subsequent owner of the soil, and *a fortiori* will that be the case where such rights are derived from the owner of the soil by express grant.

The plaintiff was entitled to judgment upon the findings. Judgment and order reversed, and cause remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; McKINSTRY, J.

(69 Cal. 244)

*In re* BOWMAN. (No. 11,396.)

Filed March 31, 1886.

**INSOLVENCY—HOMESTEAD—RESIDENCE.**

In order that an insolvent may have property set apart to him as his homestead, it is not necessary that it should have constituted his residence at any time. California insolvent act of 1880.<sup>1</sup>

Department 1. Appeal from superior court, county of Alameda.  
*William Thomas* and *Henry P. Bowie*, for appellant.  
*E. W. McGraw*, for respondent.

Ross, J. Bowman was adjudged an insolvent under the insolvent act of 1880. No homestead had been selected by him under the homestead laws of the state prior to the adjudication. A lot of land upon which he never resided was set apart to him as a homestead by the insolvency court by virtue of the provisions of section 60 of the act of 1880, which declares:

"It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and

<sup>1</sup>See note at end of case.

personal property as is by law exempt from execution, and also a homestead, in the manner provided by section 1465 of the Code of Civil Procedure."

The appellant contends that the court below erred in so doing, because the premises set apart to the insolvent never constituted his residence. The statute regulating this matter does not require that they should ever have constituted the residence. The finding of the court is that the property set apart is suitable and proper for a homestead, and that was a sufficient basis for the order setting it apart. As has been seen, the statute makes it the duty of the court to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution, and also a homestead, in the manner provided in section 1465 of the Code of Civil Procedure. That section is one of the sections relating to the estates of deceased persons, and reads as follows:

"Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children, of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded, provided such homestead was selected from the common property, or from the separate property, of the person selecting, or joining in the selection, of the same. If more has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead, in the manner provided in article 11 of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent."

The statute does not attach the condition that the decedent must have resided upon the premises before a given piece of property can be set apart for the use of the survivor, or, in case of his death, to the minor children of the decedent; but, in express terms, provides that if no homestead has been selected, designated, or recorded, (under the general homestead laws,) or in case the homestead so designated was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead, etc. Such a homestead, as was held in *Re Estate of Busse*, 35 Cal. 310, may be carved out of any property left by the decedent which is capable of being made a homestead.

Judgment affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

#### NOTE.

Respecting actual residence on property being required in California, when declaration of homestead is filed, see *Skinner v. Hall*, (Cal.) *ante*, 406, and note.

A city lot, bought by a man in contemplation of marriage, and for a homestead, and inclosed and improved after marriage, with the intention of building on it as soon as means permit, is exempt, even before any dwelling-house is built on it. *Reske v. Reske*, (Mich.) 16 N. W. Rep. 896.

(69 Cal. 251)

## THORN and others v. FINN. (No. 11,505.)

Filed April 1, 1886.

## NEW TRIAL—NOTICE OF INTENTION TO MOVE FOR—WAIVER OF NOTICE OF DECISION.

A party may give notice of his intention to move for a new trial without waiting for the service of the notice of decision upon him, and by so doing service of the notice of decision was waived.

Department 2. Application for *mandamus*.

*W. H. Tompkins*, for petitioner.

*A. N. Drown*, for respondent.

THORNTON, J. In *Savings & Loan Society v. Thorne et al.*, after the decision of the court was duly rendered in favor of plaintiff, and an order for judgment in favor of plaintiff entered on the minutes of the court, which was done on the thirty-first day of March, 1882, the defendants on the third of April, 1882, served and filed their notice of intention to move for a new trial. Subsequently a statement on said motion was prepared by defendants and served on plaintiff, to which plaintiff proposed amendments. These amendments were served on defendants. In the month of June, 1883, the plaintiff and defendants, by their respective attorneys, agreed to the statement. The statement they agreed on was afterwards, on the eighteenth of February, 1885, presented to the Hon. J. M. Allen, the judge of the superior court before whom the cause was tried, and by him was certified and allowed as correct. On a subsequent day the motion was regularly called for hearing in said court, and was on the sixth day of March, 1885, denied on the ground of "laches, failure, and lack of diligence in the prosecution thereof."

The findings in the cause above entitled were filed on the twentieth of October, 1882. No notice of this decision was ever served on defendants. Subsequently to the denial of the above motion, the defendants served and filed another notice of motion to move for a new trial, proposed a statement on said motion, and served the same on plaintiff's attorneys. To this statement plaintiff proposed amendments, at the same time reserving objections to this statement, and to the notice of intention to move for a new trial, just above mentioned. These objections were as follows:

"(1) That there is no motion for a new trial pending herein,—the record herein showing that defendants gave notice of motion for a new trial on the third day of April, 1882, and thereafter proposed, and caused to be settled and filed herein, their statement on said motion for a new trial; and that thereafter, on the sixth day of March, 1885, the said motion of April 3, 1882, for a new trial was regularly denied by this court, and that the alleged motion for a new trial, made upon the sixteenth day of March, 1885, and upon which the present proposed statement of the defendants rests and is founded, was and is wholly void and ineffectual and inoperative.

"(2) That the said alleged motion for a new trial, of which notice was given and filed March 16, 1885, was made and notice thereof given and filed

too late; being about two and a half years subsequent to the decision herein rendered.

"(3) That the so-called proposed statement of the defendants was not served or proposed in time; being two years and a half or thereabouts, subsequent to the decision herein, and being nearly three years subsequent to the making, serving, and filing of said defendants' first notice of motion for new trial herein.

"(4) That defendants have been guilty of gross laches and want of diligence in their failure to serve and file, for so long a period, the notice of motion for new trial, which was served and filed by them herein on March 16, 1885, and in delaying and neglecting for so long a time to propose the so-called statement on motion for a new trial heretofore, as aforesaid, served on April 4, 1885; and that by reason of such laches and negligence, defendants have forfeited and waived any right ever to prosecute the said motion of March 16, 1885, or to have settled the said proposed statement served on April 4, 1885.

"And hereby expressly reserving and claiming the benefit of the said exceptions and objections to the said motion for a new trial and to the said 'proposed statement' served and proposed on April 4, 1885, plaintiff furthermore comes and objects to the said proposed statement as a statement of the said case, and hereby proposes the following changes and amendments," etc.

Afterwards this statement, with the proposed amendments, were presented to Judge ALLEN for settlement, who refused to settle it on the grounds stated in plaintiff's objections. The statement and amendments were then presented to the Hon. J. F. FINN, the successor to Judge ALLEN, for settlement. Respondent also refused to settle the statement. This application is for the mandate of this court to Judge FINN, commanding him to settle the proposed statement.

We see no grounds for it. The motion for new trial was regularly heard and denied. The defendants contend that their first motion of intention having been served and filed before a notice of the decision was served on them, that it was a nullity, and that all proceedings under it were null. But a party may waive notice of the decision, and, by giving notice of intention to move for a new trial, he does waive it. This was substantially held in *Cottle v. Leitch*, 43 Cal. 322, and we think held correctly. Here the defendants not only gave notice of intention, but took all other steps preparatory to bringing that motion to a hearing down to a settlement of their statement in February, 1885, nearly three years after their first notice of intention was given. We do not think in this state of circumstances that the contention of defendants, that their notice first given was null, should be regarded with any consideration. If their conduct is not a waiver of notice of the decision of the cause, it would be difficult to say what conduct would amount to a waiver.

It is the judgment of the court that the application should be denied, and the proceedings dismissed. So ordered.

We concur: MCKEE, J.; SHARPSTEIN, J.

(68 Cal. 245)

**ACKER v. SUPERIOR COURT. (No. 11,188.)**

Filed April 1, 1886.

**APPEAL FROM JUSTICE'S COURT—TRIAL IN SUPERIOR COURT.**

A superior court has no jurisdiction, on an appeal from the justice's court on questions of law and fact, to order the case back to the justice's court for trial, but should, under section 976 of the California Code of Civil Procedure, proceed with the trial.

Department 1. Writ of review.

*Royce & Cummins*, for petitioner.

*Carl F. Graef*, for respondent.

By THE COURT. Writ of review. On the application for the writ this court held that, on appeal to the superior court on questions of law and fact, the superior court has no jurisdiction to order the case back to the justice's court for trial, but should, under section 976, Code of Civil Procedure, proceed with the trial in the appellate court. The return of the writ is now before us, from which it appears that the appeal was taken as above indicated. For the reasons given in the opinion filed by this court in this case (9 Pac. Rep. 109) the order of the superior court remanding the cause to the justice's court for trial is annulled.

## SUPREME COURT OF OREGON.

(13 Or. 297)

BYERS v. COOK.

Filed March 24, 1886.

## 1. APPEAL—UNDERTAKING—WHEN IT SHOULD BE PREPARED.

An undertaking prepared and signed, with a view to be used in perfecting an appeal, is good and binding, provided it was not prepared until after the judgment was rendered, and not filed before the filing of the notice of appeal, although prepared before such notice was served.

## 2. SAME—NOTICE OF APPEAL—UPON WHOM TO BE SERVED—ATTORNEY.

One who acts for another as attorney in a justice's court is not an attorney in the same sense as one who is retained as such in a court of record, and hence in the former case a notice of appeal need not be served upon such person.

*J. H. Woodward*, for appellant.

*E. Mendenhall*, for respondent.

BY THE COURT. This appeal is from a judgment entered upon an order dismissing an appeal from justice's court to said circuit court. A judgment was rendered against the appellant in the justice's court on the third day of August, 1885. On the seventh day of that month and year the appellant prepared and signed, with surety, an undertaking on appeal therefrom to the said circuit court. An affidavit of the surety showing that he was qualified as such was attached to the said undertaking, and on the twenty-fifth day of August, 1885, a notice of appeal having been duly prepared, was served upon the respondent; and on the twenty-eighth day of August, same year, said notice of appeal, with proof of service, was filed with the said justice, and thereupon said undertaking was also filed with him. The transcript of the justice's court proceedings in the case having been duly filed in the said circuit court, the respondent filed a motion to dismiss the appeal upon some six grounds enumerated therein, and on which motion the order was made, upon which said judgment was entered.

The first, second, third, and fifth grounds of the motion are so general that they cannot be considered.

The fourth one is to the effect that the notice of appeal was not served upon the respondent's attorney; and the sixth one that the undertaking was signed, and the affidavit of the surety taken, prematurely. Neither of these grounds, in the opinion of the court, is tenable. The undertaking was not intended to nor had any effect until filed. *State v. Young*, 23 Minn. 551. It was prepared and signed with a view, no doubt, to be used in perfecting the appeal; and so long as it was prepared after the judgment was rendered, and not filed until the notice of appeal was filed, it was valid and binding. The law will not concern itself about such trifles. It looks to

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the substance, and not to the form, in such matters. It would have been more exact, perhaps, to have waited until after the notice of appeal was served before preparing the undertaking, but it was no such error or defect as could have affected the substantial rights of the respondent.

The other point of the motion referred to is groundless. The appellant did not need to serve the notice of appeal upon the attorney, Jolly. His having appeared for the respondent before the justice did not substitute him for the respondent. When an attorney is employed by a party to an action in a court of record, and gives notice of his retainer, he stands in the place, stead, or turn, of the party, and should be served with all subsequent papers in the action, where they are not specially required or directed by the statute to be served upon the party; but that rule does not apply to a person who acts as an attorney for another in a justice's court. In the latter case, he acts more as counsel, and his authority is limited to the matters that transpire there. In the one case he acts as attorney for the party, (section 123, Justices' Code;) in the other, he "appears for and represents the party" "in the written proceedings in the action," (section 1000, Civil Code.) There is evidently nothing in that point.

We think the court erred in dismissing the appeal, and that the judgment appealed from should be reversed, and the action be reinstated upon the calendar of the circuit court; and it is so ordered.

(13 Or. 308)

#### JOHNSON *v.* KNOTT and others.

Filed March 31, 1886.

##### 1. CONSTITUTIONAL LAW—SHORES OF NAVIGABLE STREAMS.

The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states, respectively.

##### 2. BOUNDARIES—MEANDER LINE, HOW DETERMINED.

The correct location of a certain piece of land being determined by the course of a "meander line" mentioned in the survey, such line is identical with the continuous high-water mark of the stream to which reference is thereby made.

##### 3. SAME—HIGH-WATER MARK—WHO SHOULD DETERMINE—JURY.

The services of a jury should be employed to locate the line of high-water mark in a stream, and the proper time for their detecting such line is after the subsiding of the waters.

##### 4. EASEMENT—PAYMENT OF TAXES—EVIDENCE AS TO TITLE.

The payment of taxes by the land-owner is not inconsistent with the rights of one who has an easement in the land.

*Geo. W. Yocum and W. Scott Beebe*, for appellant.

*C. B. Bellinger*, for respondents.

THAYER, J. The appellant commenced an action against the respondents in the court below to recover the possession of certain real property described as fractional lots 3 and 4, in block 2, of East Portland, alleged to be wrongfully withheld from him by the respondents,

and to recover \$500 damages for such withholding. The respondents denied appellant's ownership of the premises, and interposed a plea of the statute of limitations. The action was tried by jury, who returned a verdict for the respondents, and upon which the judgment appealed from was entered.

It is conceded by all parties that James B. Stephens settled upon a donation land claim upon the right bank of the Willamette river, under the donation law, approved September 27, 1850, and by virtue of such settlement and residence and cultivation, in accordance with the requirements of said law, obtained a patent to such claim, which was duly issued to him January 24, 1866; that the claim extends on the west to the meander line of the Willamette river, which is a navigable stream; that a part of the town of East Portland was laid off upon said claim in blocks and lots, and in which said block 2, or a part thereof, is included, which block is situated at the north-west corner of said claim, between K and L streets, in said town. In 1864 said Stephens, after his four years' residence and cultivation, sold off lot 5 of said block; and that the respondents, through mesne conveyance from him, obtained title to it in 1874. In 1871 said Stephens executed a deed of conveyance to the appellant, which purported to convey to him fractional lots 1, 2, 3, and 4, and whole lots 6, 7, and 8, in said block 2, and under which he claims ownership to the property in controversy. In 1852 the legislature of the then territory of Oregon granted to the said James B. Stephens an exclusive right of a public ferry across the Willamette river, which the respondents have obtained title to from said Stephens and his grantee thereof, and which is located on the east side of said river, at the foot of said L street. The respondents' lot 5 lies along said last-mentioned street, on the north side thereof, and contiguous thereto, and fronts Water street upon the east. Said fractional lot 4 is immediately west of lot 5, and fronts the river, and said fractional lot 3 adjoins it on the north. The respondents, and those under whom they claim, have driven piling north of the foot of L street across the front of said lots 3 and 4, in order to sheer their ferry-boat into the slip at the foot of L street as it approaches the same from the west side, which appears to be the wrongful withholding of possession complained of.

The real question in the case was whether said fractional lots were above or below the said meander line. If above, they were within the description contained in the patent; but if below it, they were not, though Stephens may have been the owner of the frontage as riparian proprietor until he sold off said lot 5. It is well settled that the United States never owned the land between high and low water mark. It was decided a great many years ago by the supreme court of the United States that the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively. *Pollard's Lessee v. Hagan*, 3 How. 219. That decision has ever since been adhered to;

and in *Railroad Co. v. Schurmeir*, 7 Wall. 272, the same rule was declared to apply to fresh-water streams that were navigable. The language used in the latter case is that the title of the United States to lands bordering on navigable streams stops at the stream. The main inquiry at the trial should have been to ascertain the line of high-water mark in front of said block 2. A jury is an excellent institution to determine such a question. The only matter to be decided in such a case is the location of the line indicating high-water mark; and that involves a discrimination between the upland and the bank proper of the stream. The banks of a river serve, of course, to hold its waters within its bed, and the point to which the water usually rises, in an ordinary season of high water, I would regard as high-water mark, and that it constituted the true meander line. This line is easily observed by an examination of the banks of a river long after the water subsides, and an intelligent jury, when permitted to view the locality, will have no difficulty in detecting it.

The appellant was obliged to show upon the trial, in the first instance, that the premises in controversy were above the line referred to. He could not trace his title back to the United States without showing that fact, and before he could prove by a witness that the premises were included in the description contained in the patent, he should have shown that the witness knew where the line of high-water mark was in the immediate locality. The jury having passed upon the question, their verdict must be regarded as conclusive; and it can only be impeached by showing from the record that the jury were misled by the admission of improper evidence, erroneous instructions, or that proper evidence upon the subject was excluded by the court.

The jury were instructed, substantially, that in case they found that the premises in question were included in the description contained in the said patent to Stephens, it passed to Stephens under the patent, provided it was not below high-water mark of the Willamette river. This instruction was clearly correct, and involved the main point in the case. The instruction that the bank of a river was that part of the land between ordinary high and ordinary low water mark, and belonged to the state, was as favorable to the appellant as could properly have been required. The instruction that there was no testimony to warrant the jury in finding that there was no such land where the premises in controversy were situated, as would pass by the act of the legislature referred to by the court, was doubtless correct. At least, there is nothing in the bill of exceptions showing to the contrary. The act referred to was the act of October 26, 1874. It granted to the riparian proprietors upon the Willamette river all right and title of the state in the tide and overflowed lands in front of them. This evidently referred to such tide and overflowed lands as were the subject of sale, and could be rendered susceptible of cultivation by reclamation. It is not reasona-

ble to suppose that the legislature intended to grant away a part of the bed of said river. It could no more do that than it could grant the entire river. The decision of this court in *Andrus v. Knott*, 12 Or. 501, S. C. 8 Pac. Rep. 763, is conclusive of that point. The instructions given by the court as to the character of riparian rights, and that the appellant could not, by virtue of such rights alone, recover the possession of land in that character of action, I think, was correct. Admitting that the respondents in driving the piling infringed upon the rights of the appellant, it was no disseizin unless the latter was in some degree owner of the soil. It appears to me that the questions of ownership of the land in controversy, as to the rule of gaining and losing land by accretions and abrasions, and upon the subject of the statute of limitations, were properly and fairly submitted to the jury.

The appellant asked the court to give the following instructions:

*First.* "If you find from the evidence that the plaintiff was the owner of the premises on the twenty-seventh day of November, 1874, and that on that day, or after that day, some portions of lots 3 and 4, in controversy in this action, was high ground, above ordinary high-water mark; and you further find that some parts of said lots now lie between ordinary high and ordinary low water mark on the Willamette river; and you further find that the plaintiff has not sold or conveyed away his title to said property,—then, and in that case, you will find for the plaintiff."

*Second.* "If you find from the evidence that a part of lots 3 and 4, in controversy in this action, at the east end of said lots back from the river, was high ground, above ordinary high-water mark, on November 27, 1874, and afterwards, while plaintiff was still the owner of said lots, then, and in that case, Johnson, the plaintiff, became the owner in fee of all the tide or overflowed lands lying in front of said lots, and which was located between ordinary high water and ordinary low water, on the Willamette river; and unless you find from the evidence that defendants have gained an adverse title by long possession, as hereafter explained, or that plaintiff has lost or conveyed away his title, the plaintiff is still the owner of the property in controversy, and you will so find by your verdict."

*Third.* "Before the defendants can defeat the title of plaintiffs to the property in controversy on the ground of adverse possession, they must prove that the defendants, or some one of them, their ancestors, grantors, and predecessors, have been in the open, continuous, uninterrupted, and exclusive possession of the premises for a period of 20 years preceding the commencement of this action, and that such possession must have been in hostility and adverse to the title of the plaintiff."

These the court refused. The first one is very general, and, if given, would necessarily have confused the jury. It would have referred to the jury the duty of finding an ultimate fact in the case, instead of finding facts from which it might be deduced. The jury had no right to find that the appellant was at any time the owner of the premises, except as a result of other findings. The appellant's counsel could, with equal consistency, and with better logic, have asked the court to instruct the jury that if they found that the appellant was the owner of the premises they would find for the appellant.

The court had told the jury the circumstances under which they could find the ownership of the premises, and the counsel had no right to ask it to stride over them. The counsel was not entitled to the instruction as framed. The second one is not a correct proposition of law. If a part of lots 3 and 4 had been above high-water mark, such part would have been conveyed to the appellant, as the court substantially had instructed; but it would not have followed that he became the owner in fee of all the tide and overflowed lands lying in front of said lots, had there been any such lands, nor that he was the owner of the balance of the property in controversy. He would have owned just what portion of said lots was above high-water mark, and the riparian rights attached thereto. Nor is the third of said instructions asked correct. The counsel's view of the amendment of the statute of limitations adopted in 1878 is not a proper construction of it. The old period of 20 years' limitations in such cases was superseded, and it is now 10 years. The amendment was intended to apply to all cases mentioned in section 4 of the act, except that where the cause of action had accrued, and 10 years expired, or would expire within one year from the approval of it, an action could be brought within one year from the date of the approval. The proviso in section 4 of the act as amended merely gave the year in which to bring an action in the cases mentioned. In all other cases the period expired in 10 years.

The appellant's counsel complains because the court excluded a map of East Portland which was offered in evidence. The map was of no authority, and would not have benefited the appellant's case if it had been admitted in evidence, though I cannot see why it should have been objected to or excluded.

The refusal to permit Chapman to answer the question as to whether block 2 was contained in the patent to Stephens or not I think was proper. The question called for a conclusion. The witness could, if he had known, have been allowed to state where the line of high-water mark was with reference to the block; could have been inquired of as to whether the block, or any part of it, was above the said line; but to ask him whether or not it was contained in the patent was calling for an opinion instead of a fact.

The testimony offered as to the value of the use and occupation of the premises by the defendant was improper. They had evidently no rental value, and, under the circumstances of the case, could not have injured the appellant.

The ruling of the court upon the testimony offered in rebuttal, as it was termed, was clearly within the discretion of the court. The evidence should have been given in the first instance; it was a part of the appellant's case to show that the premises were above the meander line. It was necessary to prove that, in order to show that Stephens owned them at the time he executed the deed to the appellant.

The answer of the witness Sweeney that Knott had told him that there would be a bill introduced in the legislature that would cover that property was entirely immaterial. It proved nothing whatever, and the court's striking it out did not affect the case.

The question to the appellant, when on the stand as a witness, as to who had paid the taxes on the property all the time, could have had no bearing on the case if he had returned a favorable answer. The adverse possession set up by the respondents must necessarily have consisted of a public, open, and notorious occupation of the premises as used by them under a claim of right; and the appellant's having paid the taxes would not have disproved it. I do not understand that the occupation extended over the entire premises in dispute, but that it consisted in maintaining the piling before referred to, and was insisted upon more in the nature of right to exercise the privilege than a claim of title to the land. Under that view, the general ownership of the land might be in the appellant, and the respondents entitled only to an easement, in which case the payment of the taxes by the former would not be inconsistent with the alleged right of the latter. One person may have a liberty, privilege, or advantage in the land of another for a special purpose arising out of grant or prescription, and a grant would be presumed from the adverse use of such right for a period equal to the statute of limitations. From the evidence shown by the bill of exceptions I would infer that it was the use by the respondents of the premises, in the particular way mentioned, for the period of time claimed, upon which their plea of the statute of limitations was founded. In that case, it would be immaterial whether the appellant paid the taxes or not, as the ownership of the premises subject to such right would be in him. If there has been any error committed in the case it must have been done by the jury, and their decision of the questions of fact involved in the issues is not the subject of review.

In my opinion, the judgment appealed from should be affirmed.

(13 Or. 301)

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**HASELTINE and others v. ESPEY and another.**

Filed March 31, 1886.

**1. MORTGAGE—DEED IN FORM ABSOLUTE—EFFECT.**

A security taken in the form of an absolute deed, but not claimed as anything but a mortgage in effect by the grantee, should not, of itself, ordinarily create discredit as to its fairness.

**2. SAME—HOW TO BE RECORDED.**

An absolute deed, though intended to operate as a mortgage, cannot properly be recorded in any other book than the Book of Deeds.

*C. P. Heald*, for appellants.

*Ed. Mendenhall* and *W. H. Adams*, for respondents.

THAYER, J. The appellants, who are copartners in business, obtained a judgment in said court against the respondent Espey, on

the twenty-seventh day of June, 1884, for the sum of \$710.71, and upon which they caused an execution to be issued. Prior thereto, and on the twelfth day of June, 1884, the said Espey had made an assignment for the benefit of creditors under the insolvent act of the state. Before that time, and on the sixteenth day of October, 1883, said Espey had executed a deed of conveyance to the respondent Thompson to certain real property owned by him, situated in said county. After obtaining the judgment against Espey, and issuance of the execution, the said appellants commenced a suit in the said circuit court against Espey and Thompson, to set aside the said deed from Espey to Thompson, alleging in their complaint in the suit that it was without consideration, and made for the purpose of misleading, deceiving, hindering, and delaying Espey's creditors. The respondents denied the allegations as to the deed being without consideration, and given for the purpose alleged in the complaint; and they averred that it was intended as a mortgage, and was given to secure the sum of \$12,575 due from Espey to Thompson for money loaned and liabilities assumed. They also allege the existence of liens upon the land in the form of judgments and mortgages in favor of other parties, and set up the assignment by Espey for the benefit of creditors, and transfer of the equity of redemption to the assignee. The case was referred to a referee to report his finding of facts and law, and upon which said referee found that the said deed was a mortgage; that it was made in good faith, for a full consideration, to secure an existing indebtedness from Espey to Thompson; and that the land in question was conveyed by deed of general assignment for the benefit of creditors by Espey to one W. B. McKenzie, as assignee, before the commencement of the suit; and that the said complaint should be dismissed. The circuit court confirmed the referee's report, and thereupon the decree appealed from was entered.

The appellants' counsel contends that the transaction between Espey and Thompson, as shown by the evidence in the case, was suspicious, and that the said deed was not executed in good faith. He also claims that the deed, being in fact a mortgage, but recorded as a deed, was improperly recorded; and that the appellants' judgment against Espey has priority over it.

There is nothing in the evidence, as I have been able to discover, that is calculated to impeach the *bona fides* of the transaction. It shows very conclusively that Thompson advanced money to Espey, and indorsed to him for a large amount, which he subsequently paid off; that the amount advanced and paid covered substantially the amount of consideration expressed in the deed. The appellants' counsel insisted that many circumstances surrounding the affair indicated that the advancement of the money, and indorsing Espey's paper by Thompson, might have been for the purpose of enabling the former to cover up his property, and defraud and delay his creditors; but he has not been able to point out any badges of fraud that would

justify the court in concluding that the transaction was intended for any such purpose, or that it was a sham. A good deal of stress has been laid upon the fact that Thompson, instead of taking a mortgage from Espey in the usual form, took an absolute deed to the land. This is claimed to be a significant circumstance; but it does not appear that Thompson ever claimed that the instrument was other than a mortgage, or that creditors were injured or affected thereby. The practice of taking security in that form is quite common in this state, and I do not see, where there has been no attempt to disguise the transaction, any grounds of suspicion in consequence of it. If a party were to claim, in such a case, that the deed was an absolute conveyance, when it in fact was only intended as a security for the payment of a debt, the pretense would undoubtedly occasion suspicion, and be an *indicium* of fraud. A court of equity, in such a case, would scrutinize very closely the affair, and require very satisfactory proof that it was not for a fraudulent purpose; but ordinarily a security taken in that way would not create discredit as to its fairness. Espey, at the time he executed the deed in question, was carrying on his business as usual, and seemed to have preferred to secure Thompson's indebtedness by a deed to the premises absolute in terms. Thompson did not exact that kind of security,—was not in the state when it was given. The deed was duly recorded, and it cannot be claimed that it affected any one injuriously, and there is nothing in the proofs showing that it was intended to defeat or delay Espey's creditors.

The deed was recorded in the Book of Deeds in the office of the clerk of the county of Multnomah, and not in the Book of Mortgages of that office. This is claimed to have been improper, and not to amount to a recording. This question would be unimportant were it not for a provision of our statute (section 268 of the Civil Code) which provides that "a conveyance of real property, or any portion thereof or interest therein, shall be void as against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment, or the transcript thereof, as the case may be, or unless it be recorded within the time after its execution provided by law as between conveyances for the same real property." It has been held that "if a mortgage is not recorded in the mortgage books it cannot be found by means of the index to those books, and therefore is not regarded as properly recorded." Section 546, Jones, Mortg., and cases cited. But the author, at section 548 of that work, says that "when an absolute deed is given in the way of security, with written defeasance back, the rights of the mortgagee are in general fully protected without any record of the defeasance. The deed is sufficient notice of his interest. In fact, it is notice of a greater interest than he actually has. But it does not matter, except in those states in which the recording of the defeasance is expressly required as a condition upon which the mortgagee shall derive any benefit from the record of the deed, as in California" and several other states he names.

According to the view there expressed, the recording of an absolute deed, although given to secure a debt, in the Book of Deeds is sufficient, in the absence of such a statutory requirement.

It seems to me that a deed absolute in terms should be recorded in the Book of Deeds, whatever might be the object or purpose for which it was executed; and that it would impart notice as effectually as if recorded in the Book of Mortgages. It could hardly be presumed that a party, desirous of ascertaining whether the title to real property was affected or not by an act of the claimant, would confine his search to the Book of Mortgages alone. If, however, the statute required such an instrument to be recorded there, it would have to be so recorded in order to constitute notice; but the statute only requires that separate books shall be provided for the recording of deeds and mortgages, in one of which deeds left with the clerk shall be recorded, and in the other mortgages. Unless, therefore, this provision must be construed so as to render it imperative upon the clerk to record in the Book of Mortgages every deed intended as such, irrespective of its terms, then the record of it in the book in which its terms indicate that it should be recorded would be sufficient. I do not believe that said provision of the statute should be so construed. I am of the opinion that an absolute deed, though intended as a mortgage, cannot properly be recorded in any other book than the Book of Deeds. Such an instrument would, at law, be a deed, whatever character equity might give it. The proofs are quite convincing that the appellants, prior to the time of their debt, upon which their judgment against Espey was obtained, and prior to its contraction, had notice of the execution of the deed, and that Espey had power to sell the property. Under such circumstances, it was immaterial where the deed was recorded, or whether it was recorded at all; but it is not necessary, under the view indicated, to consider that question, nor is it necessary, under the circumstances, to consider the effect of said section 268 of the statute before set out.

The respondents' counsel raised several questions affecting the appellants' right to recover in the suit in any event, but as the conclusions arrived at respecting the questions considered completely dispose of the case, it is not necessary to notice them.

I am of the opinion that the circuit court decided the case correctly, and that the decree appealed from should be affirmed.

## SUPREME COURT OF UTAH.

(4 Utah, 363)

## DUCHENEAU v. HOUSE, Justice of the Peace.

Filed April 10, 1886.

1. JUSTICE OF THE PEACE—SUMMONS—TIME FOR APPEARANCE OF DEFENDANT  
"FIVE DAYS."

The words "within five days," in Laws 1884, p. 288, § 718, referring to the time within which defendant must appear in justice's court, does not include in the requirement thereby intended the first day,—that is, the day of the issue of the summons; and notwithstanding that the justice may have fixed an hour for such appearance, judgment by default thereupon will not be valid until the five days have expired.

## 2. SAME—PREMATURE ENTRY OF JUDGMENT BY DEFAULT—REMEDY OF PARTY AGGRIEVED—APPEAL—CERTIORARI.

When the justice is acting within his general jurisdiction as to the subject-matter, but exceeds his jurisdiction as to the party by rendering judgment before the time to answer has expired, and relief by way of appeal is open to the party, he must resort to the appeal, and not to the writ of *certiorari*.

Appeal from First district.

*Dickson & Varian*, for appellant.

*J. N. Kimball* and *A. R. Haywood*, for respondent.

BOREMAN, J. The respondent applied to the district court for a writ of *certiorari* to compel the appellant, a justice of the peace, to certify to that court for review the case of Tarpey and Phillips against said Charles Ducheneau, then in the justice's court. Summons had been served on Ducheneau, the defendant in that action, on the thirtieth day of March, 1885, at 9 p. m., in the precinct where the justice held court. The answer of Ducheneau was not filed until the fourth day of April, 1885, although he had sent it to the justice on the third day of April. Judgment was rendered against the defendant, Ducheneau, on the morning of the fourth of April. The answer of the defendant, Ducheneau, was received by the justice, and receipt thereof acknowledged on the same fourth day of April. Respondent claimed that as defendant in that action he had all of the fourth day of April in which to file answer, and that the justice exceeded his jurisdiction in giving judgment before the five days' time for answering had expired. The district court granted the writ of *certiorari*, and, upon the hearing, adjudged and decreed that the judgment in the justice's court be reversed and annulled. From the decision and judgment of the district court the appellant (House) has brought the case to this court.

In our civil procedure act it is provided that if the defendant, in an action before a justice of the peace, be served with summons in the precinct in which the action is brought, he must appear and answer the complaint "within five days." Laws 1884, p. 288, § 718. It is further provided in said act as follows:

"Sec. 8. The time within which any act provided by law is to be done is computed by excluding the first day, and including the last day, unless the last day is a holiday, and then it is also excluded."

In counting the five days we are not to count the first day,—that is, the thirtieth March,—but are to count the fifth day,—that is, the fourth of April. Beginning, then, with the thirty-first of March as one day, and counting the first four days of April, we have the five days within which the defendant in that action was authorized to answer. It is sometimes said that when an act is authorized to be done after a fixed number of days' notice, the doing of the act on the last of such days is a compliance with the statute. Such is the ruling in *Misch v. Mayhew*, 51 Cal. 514, in which the court held that where a "three-days notice" was required of an act proposed to be done, the doing of it on the third day was a compliance with the statute. But if, in such a case, the party had been authorized to do an act "within" three days, we are inclined to think the court would not have excluded it if done at any time on the third day.

It is claimed by appellant that the sections we have quoted, together with section 723 of the same act, requires the justice to fix in the summons an hour for the appearance of the defendant in any case before him, and that as the justice fixed 10 A. M. of the fifth day for the defendant in said action before him to appear, that the justice, after waiting one hour after that time, was justified in entering default and judgment. The words "time fixed in the summons," as found in said section 723, presuppose some antecedent provision requiring a time to be fixed. We find such provision in section 718 of the same act; but in this latter section we find that instead of the words "time fixed," it speaks of the "time specified," in the summons; and, according to said section 718, the "time specified" in the summons is five days, if the party be served with summons in the precinct in which the action is brought; and ten days if served out of the precinct, yet in the county; and twenty days if served elsewhere. We find nothing in said section or elsewhere in regard to fixing an hour for the appearance of the defendant. If the justice should assume to fix an hour, he would have to fix an hour on each of three different days, to suit the five days, the ten days, and the twenty days specified in the summons; but we see no reason for fixing any hour whatever, further than is fixed by the five, ten, or twenty days' limit. The statute, in section 723, provides for the justice to fix a day for trial, but that is after appearance; and possibly the words "time fixed in the summons," as specified in section 723, should be the "time fixed in the notice," as notice is specified prior thereto in said section. But section 757 requires the justice to wait one hour after the "time specified in the summons," thus making it immaterial, so far as this case is concerned, whether the word should be "summons" or "notice." The appearance of the defendant on the fifth day was within time, and the justice had no authority to

enter default on judgment until said five days had expired; and judgment entered before the expiration of said five days was error, and the defendant was, as we think, entitled to have his answer filed as of that day, and to be heard thereon.

Notwithstanding the foregoing views, in the case at bar the appellant maintains that the allowance of the writ of *certiorari* was error, as respondent was entitled to an appeal from the judgment of the justice. The Code of Civil Procedure (Laws 1884, p. 322, § 951) provides for the issuance of the writ of *certiorari* when the tribunal, etc., "has exceeded the jurisdiction of such tribunal," etc., "and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." And section 854 of the same Code allows "any party dissatisfied with a judgment rendered in a justice's court" to appeal therefrom to the district court. In the case of *Golding v. Jennings*, 1 Utah, 135, the court says that where the court in which the case sought to be reviewed is pending, has no jurisdiction of the subject-matter, that a writ of *certiorari* is proper, notwithstanding the statute gives the party the right to an appeal, for the appeal in such a case would not be an adequate remedy.

The case at bar is an action for trespass, and damages under \$300. Such an action is within the general jurisdiction of a justice's court, and hence an appeal would be an adequate remedy. Whether the court in *Golding v. Jennings* was correct in saying that a writ of *certiorari* would be proper when the court below acted without its jurisdiction, and did not simply exceed it, it is not now necessary for us to decide; but where the justice is acting within his general jurisdiction as to the subject-matter, but exceeds his jurisdiction as to the party, by rendering judgment before the time to answer has expired, and relief by way of appeal is open to the party, we think he is bound to resort to the appeal. We cannot see wherein it is not an adequate remedy. We think, therefore, that the justice ought to have allowed the answer of respondent to have been filed; but its not having been done, the respondent herein should have taken his appeal from the judgment of the justice to the district court. The judgment of the district court, therefore, is reversed and remanded, with directions to the district court to quash and dismiss the writ.

LANE, C. J., and POWERS, J., concur.

## SUPREME COURT OF NEVADA.

(19 Nev. 312)

STATE *ex rel.* HARRIS *v.* BLOSSOM.

Filed March 30, 1886.

OFFICE AND OFFICERS—TITLE TO OFFICE—DE FACTO—DE JURE.

If an office is filled, and the duties appertaining thereto are performed, by an officer *de jure*, another person, although claiming the office under color of title, cannot become an officer *de facto*.

Application for *mandamus*. The opinion states the facts.

T. Coffin, for relator.

D. W. Virgin, for respondent.

LEONARD, J. Relator seeks to compel the payment of two certain warrants drawn by the auditor of Douglas county upon respondent, as treasurer thereof, on account of salary of S. Somerfield as teacher in school-district No. 2, Douglas county, for the months of September and October, 1885; said warrants having been duly assigned to relator. In November, 1884, J. Q. Adams, H. Vansickle, and J. S. Childs were elected school trustees of said district for the term of two years. In March, 1885, the legislature passed an act providing for the election of new school boards in all the school-districts of the state, on the second Saturday in May following, and also that the new trustees should assume the duties of their office on the first day of September, 1885.

Under the statute named, M. Harris and two other persons were elected trustees, and they thereafter qualified according to law. But one public school was required in said district, and on the fifteenth day of August, 1885, the old board held a public meeting, and employed a sufficient number of competent teachers for the ensuing school year, and M. Harris, one of the new trustees, was present at such meeting. Under the statute the school year commenced September 1st, but it was the custom throughout the state to open schools on the first Monday in September, which, in 1885, was on the seventh day of the month. On the first day of September the new board took forcible possession of the only public school building in said district, against the protest of the old board, and installed therein as teacher the said Somerfield, who was cognizant of the fact that other teachers had been employed by the old board. On the seventh of September, and for a long time thereafter, the new board held forcible possession of said school building. On the morning of the seventh the old board went to the school-house, and demanded the possession thereof for the purpose of commencing the school with the teachers employed by them. Possession was refused, and they then engaged another building in the district, and placed therein their said teachers, where they continued to maintain the public school, until, sub-

sequently, the public school building was given up to them. Somerfield taught his school during the months of September and October. On the tenth of September, 1885, proceedings were instituted in this court, by the attorney general, to determine which of the two contending boards was entitled to perform the duties of school trustees. On the seventh of November we decided that the second section of the statute approved March 12, 1885, under which the members of the new board were elected, was unconstitutional, and that Adams, Vansickle and Childs, constituting the old board, were the lawful trustees. *State v. Harris*, 8 Pac. Rep. 462. The new board did not at any time discharge the teachers employed by the old board, or notify them to discontinue their schools.

The principle ground urged by relator in support of his petition is that Harris and others were the *de facto* board, and that their acts, as such, were good and binding in law as to the public and third parties. The general principle stated by counsel for relator, that, as to the public and third parties, the acts of *de facto* officers are binding, is well settled and admitted. But, applying it fully to the present case, is relator entitled to the writ sought? From the admitted facts, can it be said that M. Harris and his associates constituted the *de facto* board? There were two boards, each claiming that the other was unlawful; each urging and maintaining the validity of its own acts; each proceeding as though the other did not exist, in the matter of employing teachers, etc. The old board denied by word and acts that M. Harris and others were trustees, and continued to perform all the duties of such officers as though the statute of 1885 had not been passed, or the new board been elected. If M. Harris and his associates had not acted or pretended to act, it cannot be denied that the old board would have been trustees *de jure* and *de facto*. If the old was not the *de facto* board, it is not because it failed to exercise all the functions of a legal board, but it is because the new board did the same, and, while so acting, the statute under which they were elected had not been declared unconstitutional by any competent tribunal.

It is undoubtedly true, as claimed by counsel for relator, that the new trustees would have become a *de facto* board if the old ones had not acted as such; but since they did act as above stated, were they not the *de facto* board? Two physical bodies cannot occupy the same space at the same time, and two persons cannot be officers *de facto* for the same office at the same time. If an office is filled, and the duties appertaining thereto are performed, by an officer *de jure*, another person, although claiming the office under color of title, cannot become an officer *de facto*. *McCahon v. Commissioners, etc.*, 8 Kan. 441; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackembush*, 22 Barb. 80; *Cohn v. Beal*, 61 Miss. 399.

The supreme court of Kansas has gone so far as to hold that a justice of the peace who refused to give up his office to his legally

selected and qualified successor was the *de facto* justice, although, upon the latter's refusal to deliver up the office, the *de jure* justice obtained a new docket, and commenced also to act as a justice of the peace, and acted in such capacity until the trial in the *quo warranto* proceedings. *State v. Buckland*, 23 Kan. 259; *Morton v. Lee*, 28 Kan. 286. If the last case is good law, and as to that we express no opinion, it would sustain us in holding that the old was the *de facto* board, even though M. Harris and his associates had constituted the *de jure* board.

Counsel for relator refers us to *State v. Carroll*, 38 Conn. 449, wherein it was held that a justice of the peace, temporarily holding a city court, under a law alleged to be unconstitutional, was at least, under the circumstances of that case, an officer *de facto*, if not *de jure*, and judgments rendered by him were valid. "An officer *de facto*," said the court, "is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised, \* \* \* under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." Applying the doctrine announced to the facts of the case then under consideration, the court held that a justice of the peace of the town of New Haven, who, in the absence of the city judge of the city of New Haven, acted as judge of said city court, according to the provisions of a statute in force, which had not been declared unconstitutional by any competent court, was a *de facto* officer, even though the statute was in fact unconstitutional. That decision has been quoted with approval by all courts, so far as we know. It certainly meets with our approbation, and it would sustain the claim of relator if the facts were that the old board failed to exercise the functions of trustees, and the new one performed them.

The case of *People v. Staton*, 73 N. C. 546, is also referred to and relied on by relator. In the report of the case there is an agreed statement of facts, but it is also stated that "the case agreed sets out many other facts not pertinent to the case as decided in this court, and the same are therefore omitted. All other facts necessary to an understanding of the case, as decided, are stated in the opinion of the court." There was a vacancy in the office of superior court clerk, and, under the constitution, it was the duty of the judge of the superior court to fill the vacancy. Judge MOORE had been the judge for several years, but, the general assembly being of the opinion that his term had expired, an act was passed ordering an election. "Under that act," says the court, "Judge HILLIARD was elected, and qualified, and took possession of the office, and held it, exercising all the duties and business of the office, until he was ousted under a decision of this court declaring the act under which he was elected unconstitutional. So it is now clear that, for all the time from his election,

qualification, and induction into office until he was ousted under the decision of this court, Judge HILLIARD was not the rightful judge, but he was the judge in fact." Indeed, it seems to have been taken for granted that Judge HILLIARD was the *de facto* officer. It appears that Judge MOORE *claimed* the office, but it is not shown that he performed any of the duties incident thereto, except that he appointed Norfleet clerk, *two days after Staton had been appointed by Hilliard*, and that on the first day of the first term after HILLIARD's election, when HILLIARD had taken the seat usually occupied by the presiding judge, he demanded of HILLIARD the seat as judge, which demand HILLIARD refused; whereupon Judge MOORE declared the court open for the transaction of business, and directed the sheriff to make proclamation. This the sheriff declined to do. The principal claim of the relator was that, since HILLIARD was a *de facto* officer, only, his appointee was merely a clerk *de facto*; but the court held that the appointments, like the judgments, of the *de facto* judge, had the same validity as though he had been judge *de jure* and *de facto*.

In *State v. Harris*, 8 Pac. Rep. 462, we did not decide whether one board or the other was the *de facto* board. The only question there presented was, which was the *de jure* board? We said a judgment of ouster must be entered against M. Harris and others, because their election was invalid, and, under claim of right to the offices in question, they had exercised some of the functions of trustees, although the legal board had refused to give up their offices, and had continued to perform all the duties thereof. Writ denied.

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(19 Nev. 319)

STATE v. CARDELLI.

Filed April 1, 1886.

1. LARCENY—EVIDENCE—PROOF OF OWNERSHIP.

In cases of larceny, it is essential for the prosecution to prove that the property was feloniously taken from the person named in the indictment as the owner, but this does not require that in every case direct proof of ownership shall be given.

2. SAME—IDENTIFICATION OF STOCK BY BRAND MARKS.

Testimony of the identification of brand marks found upon hides, stripped by a butcher from cattle slaughtered by him, as marks known to have been upon cattle which the prosecuting witness had missed from his herd, may be given in evidence to prove ownership, in a trial for larceny.

3. SAME—EVIDENCE—PRESUMPTION FROM ESTABLISHED FACT.

There must be some evidence to raise a presumption; but when one thing is established beyond a reasonable doubt, which to the same extent convinces the understanding that another must have happened, it is legitimate to presume it did happen.

4. SAME—ACT OF FEBRUARY 27, 1873, REGULATING MARKING OF STOCK—APPLICATION TO CRIMINAL EVIDENCE.

Section 9 of the "Act to regulate marks and brands of stock," approved February 27, 1873, which provides that "no mark, brand, or counter-brand shall be considered as lawful if not recorded as specified in this act," has no application to the use of such mark or brand in the identification of cattle as evidence in a criminal prosecution for larceny.

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5. SAME — PROSECUTION FOR LARCENY — PREVIOUS DEMAND OF PAYMENT FOR STOLEN GOODS.

The proof showing that stolen cattle had been sold to an innocent purchaser, and slaughtered by him, previous demand by the owner of payment from such purchaser is not necessary to the prosecution of the thief.

6. SAME—CHARGE TO JURY—MATTERS DISPOSED OF IN OTHER PARTS OF CHARGE.

The refusal by the court to instruct the jury as desired by a party is no cause for objection when the court has substantially disposed of the point in question in other parts of the charge.

Appeal from First judicial district court, Storey county.

The opinion fully states the facts.

*W. E. F. Deal*, for appellant.

*W. H. Davenport*, Atty. Gen., and *J. A. Stephens*, Dist. Atty. of Storey Co., for the State.

HAWLEY, J. Appellant was convicted of the crime of grand larceny for feloniously taking "three steers and two young cows, (commonly called heifers,) all of which cattle were branded with the letters J. C. on the left hip, and marked with crop and split in the left ear, \* \* \* the property of Hugh Vail and John R. Vail, partners, doing business under the firm name of Vail Bros." He claims that the evidence upon which he was convicted is insufficient in law to sustain the verdict in this: that there is no direct testimony, or other competent proof of the *corpus delicti*. The contention urged relates exclusively to the testimony submitted on the part of the prosecution as to the ownership of the cattle.

On the twenty-second of June, 1884, the Vail Bros. purchased of John Carlin the Carlin ranch, consisting of 4,500 acres of inclosed land, with a cattle range on the public lands of "25 miles each way," and a band of cattle,—“everything that Carlin owned.” The cattle were at that time grazing on the range, and were not counted until several months after the purchase. The greater portion (over 1,000 head) of these cattle were branded and marked as specified in the indictment. The range over which these cattle roamed extends to the Cardelli ranch, and the Cooney ranch, owned by the Cardelli Bros., and some of the cattle were often seen in that vicinity. In the latter part of January, 1885, appellant called at the butcher-shop of Zeigler Bros., in Virginia City, and inquired if they wished to buy any cattle. John Zeigler said he would look at the cattle first. A few days thereafter he went to the Cardelli ranch, and from thence, in company with appellant, to the Cooney ranch, where five head of cattle were found in a barn. Appellant said he kept them in the barn because “he was afraid of them breaking the fence.” These five head of cattle—three steers and two heifers—were purchased by Zeigler Bros., and delivered to them by appellant at their slaughter-house, on American flat, on the fifth of February. Either before or after the sale, appellant stated to Zeigler Bros. that he did not want his brother (Orlando) to know that he was selling any cattle. A few weeks after the cattle were

slaughtered he said to Charles Zeigler that he wanted a sack "to go out to the slaughter-house and cut the brands out of the hides."

March 1st, Vail Bros. caused a notice to be published in the *Daily Territorial Enterprise*, at Virginia City, offering a reward for the arrest and conviction of any person guilty of stealing any of their cattle. About the fifteenth of March, Hugh Vail, having received information about the sale of the cattle, went to Virginia City, examined the hides taken from the five head of cattle, and identified them as "hides of the cattle" which Vail Bros. bought from Carlin. He testified positively, as did several other witnesses, that the cattle from which the hides were taken belonged to Vail Bros. He frankly acknowledged, however, that he had no means of identifying them "except by the brands and ear-marks." There was no other direct proof as to the loss of these cattle by Vail Bros. There was testimony to the effect that men engaged in the cattle business could always identify their cattle "by the brands and marks;" that "it is an easy matter to distinguish the Carlin cattle from any other cattle in that range;" that there is no difficulty in distinguishing the Carlin cattle from the Cardelli cattle by the brands and ear-marks; that the brand of the Cardelli Bros. was O. C.; that the experience of men who have for many years been engaged in this business is that brands of the same letters, owned by different persons, are not "exactly alike;" that the five hides examined by the witnesses belonged to cattle formerly owned by John Carlin; that Carlin "always vented his cattle when sold," except when sold to be slaughtered; that the branding-iron in the possession of Cardelli Bros. with the letters J. C. was different from Carlin's brand; that the Carlin brand is a "plain J. C., without any indentations in the iron;" that the Cardelli brand has an indentation stroke on top; that one "has the letters joined together," and the other "the letters are separate;" that "it is easy to distinguish one brand from the other;" that appellant, in December, 1884, sold four steers to William Hancock; that one of these was butchered, and the other three were alive at the time of this trial; that the living steers were by John R. Vail and others recognized and identified by the brands and marks as the cattle of Vail Bros.; that the age of the cattle purchased by Zeigler Bros. was, of the heifers, about two years, and of the steers about three years. This is substantially the testimony upon the part of the prosecution.

The testimony upon the part of the defense tended to show that in 1881 the Cardelli Bros. had a brand made with the letters J. C.; that in June of that year appellant and his brother, Fancredi, branded 11 calves (steers) and one heifer, and turned them out to roam at large upon the public lands; that these cattle had been seen at different times; that appellant, in the fall of 1884, made public search and inquiry for these cattle; and his defense was that the cattle sold to Zeigler and Hancock were the same cattle as branded by him and his brother in 1881; and that they were the true owners, or, at least,

that appellant acted in good faith, believing them to be the cattle of Cardelli Bros. The testimony upon the part of the defense was in conflict with the testimony of the prosecution as to the venting of the cattle, when sold, by Carlin; the character and identity of brands and marks; and in other particulars.

1. Is this testimony sufficient to establish the *corpus delicti*? Every criminal charge necessarily involves two distinct propositions: (1) That a criminal act has been committed; (2) that the guilt of such act attaches to the particular person charged with the commission of the offense. In cases of larceny it is, of course, essential for the prosecution to prove that the property was feloniously taken from the person named in the indictment as the owner. "It must appear that the goods were stolen from the prosecutor; and if he, being a witness, cannot swear to the loss of the articles alleged to have been stolen from him, the prisoner must be acquitted." 3 Greenl. Ev. § 161.

In what manner may this proof be made? Must it always be direct and positive? Is it absolutely essential, in all cases, that the proof of the *corpus delicti* should be established independent of the other elements of the offense? While it is true that a person charged with the commission of a criminal offense is not called upon to answer the charge without satisfactory proof, upon the part of the prosecution, of the *corpus delicti*, yet it is not essential, in all cases, that there should be any direct evidence upon this point.

In addition to Greenleaf on Evidence, above quoted, appellant cites several authorities where, under the particular state of the testimony, it has been held that circumstantial evidence of the offense could not be accepted "as satisfactory in law, unless, besides this, there is direct evidence of the *corpus delicti*." Many of the cases are referred to in a note to section 1071, 1 Bish. Crim. Proc. Some of them are cases like *People v. Williams*, 57 Cal. 108, where no evidence of any kind was offered upon that point. Bishop, after citing the cases relied upon by appellant, concludes the section by saying:

"If we look at the matter as one of legal principle, we can hardly fail to be convinced that while the *corpus delicti* is a part of the case which should always receive careful attention, and no man should be convicted until it is in some way made clear that a crime has been committed, yet there can be no one kind of evidence to be always demanded in proof of this fact any more than any other. If the defendant should not be convicted when there has been no crime, so equally should he not be when he has not committed the crime, though somebody has; the one proposition is as important to be maintained as the other, yet neither should be put forward to exclude evidence which in reason ought to be convincing to the understanding of the jury."

In *State v. Keeler* the court said:

"Now, the rule should be adhered to, with the utmost and strictest tenacity, that the facts forming the basis of the offense, or *corpus delicti*, must be proved either by direct testimony, or by presumptive evidence of the most cogent or irresistible kind. In one of these methods the essential fact or facts must be established beyond a reasonable doubt. But if thus estab-

lished, or if the jury can be and are satisfied of such facts beyond this reasonable doubt, it matters not whether they are conducted to this result by direct or presumptive evidence. In other words, while the proof should be clear and distinct, it is not necessary that it should be direct and positive; for while that which is direct might be more satisfactory,—less liable to deceive and mislead,—this goes to its weight or effect, and by no means establishes that in no other way can the essential facts be shown with the requisite distinctness and clearness." 28 Iowa, 553.

The fact that the *corpus delicti* may be established by circumstantial evidence is well settled. 3 Greenl. Ev. §§ 30, 31; Burrill, Cir. Ev. 680, 734; Wills, Cir. Ev. 201; *Reg. v. Burton*, Dears. Cr. Cas. 282; *Rex v. Burdett*, 4 Barn. & Ald. 122; *McCulloch v. State*, 48 Ind. 112; *Brown v. State*, 1 Tex. App. 155; *Roberts v. State*, 61 Ala. 401; *State v. Ah Chuey*, 14 Nev. 92; *State v. Loveless*, 17 Nev. 427, and authorities there cited. In several of these cases convictions were sustained upon testimony of the *corpus delicti* which was not any stronger, or more satisfactory, than the testimony given in this case.

The general principles announced by Sir WILLIAM SCOTT, in *Evans v. Evans*, 2 Hagg. 310, that "if you have a criminal fact ascertained, you may then take presumptive proof to show who did it;" and Lord HALE's remarks, in 2 Hale, P. C. 290, that he would "never convict any person for the stealing goods *cujusdam ignoti*,—merely because he would not give an account how he came by them,—unless there were due proof made that a felony was committed of these goods,"—might be correct in all cases where the proof of the crime is separable from the proofs which furnish a clue to the perpetrator of the crime; "but the general principle which they lay down must be taken with considerable limitation, and, in order to treat the subject with accuracy, it is to be remarked that in some offenses the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving the author of it undetermined." Best, Pres. § 201.

Applying the principles of law as above announced to the facts of this case, can the position contended for by appellant's counsel be maintained? Was there no evidence for the jury to consider and pass upon? It is true that there was no direct or positive evidence as to the loss of the cattle by Vail Bros. independent of the fact of their identification by the brands and marks found on the hides; but we have shown that this was not essential. Was there any testimony as to the loss of these cattle?

The owners of a few head of stock, kept within an inclosure, would be likely to know when any were missing, and might be able to positively swear to the loss of their cattle; while stock-owners, with large herds of cattle roaming over extensive ranges, might not be able to swear positively how many, if any, were lost, until all were gathered into a corral and counted. Some die, others stray away, and, as a general rule, the fact that any are stolen can only be established, if

the thief is not caught in the act of driving them away, by testimony of similar character to that offered in this case.

It would be difficult, if not impossible, in many cases, to establish the identity, ownership, and loss of cattle in a more direct or satisfactory manner than appears from the testimony in the record of this case. If the hides had not been preserved and identified, the Vail Bros. could not have testified to the loss of these particular cattle; but with this proof of identity, taken in connection with the other facts, is it not made clear to the ordinary mind that proof was offered of the loss of the five head of cattle? It is true that neither juries nor courts should presume a fact without proof. There must be some evidence to raise a presumption; but when one thing is established, beyond a reasonable doubt, which, to the same extent, convinces the understanding that another must have happened, have we no right to presume it did happen? With the identification of the hides having the brands and marks of Carlin, does it not follow, if neither Carlin nor Vail Bros. had sold or otherwise disposed of them to other parties, and no one else had used the same brand and marks, that these identical cattle must have been taken from the possession of Vail Bros.? Was there not ample testimony of the *corpus delicti*?

The testimony which tended to show that these cattle did not belong to Cardelli, or his brothers, was, in our opinion, calculated to strengthen the evidence tending to show that they belonged to the Vail Bros. Appellant claimed to have raised these particular cattle, and to have branded them with the letters J. C. in June, 1881, when they were calves. Was this testimony true? Was this not a question of fact for the jury to decide? Was it not the duty of the jury in determining this question to consider the testimony as to the age of the cattle,—as to the difference of the branding-irons used by the respective parties,—in connection with other facts? If the jury disbelieved the testimony of the defense upon these points, would it not legitimately tend to strengthen the evidence of identity and ownership of these cattle by Vail Bros., offered upon the part of the prosecution? Many of the criminative circumstances tending to prove that the cattle were stolen by appellant necessarily tended to show that they were the property of Vail Bros. It was the duty of the jury to consider such circumstances, in connection with the fact that the hides were identified by the marks and brands as having been taken from cattle owned by Vail Bros.

If Vail Bros. had counted their cattle a week before any were stolen, and found just 1,000 head branded J. C., and a week thereafter had again gathered them in and found but 995, they could have sworn positively that 5 head were missing at the time of the second count; but they could not have sworn whether they had died, strayed away, or been stolen, unless the bodies, or hides taken therefrom, had been found and identified. There are many ways of identifying stock. A milch cow, pet calf, work oxen, or cattle of some particular brand,

might be readily recognized and identified by their color or general appearance; but large herds of ordinary cattle could not, as a general rule, be identified in such manner; and in cases of this kind the proof would certainly be as satisfactory if the cattle were identified by the brands and marks. The object in branding and marking cattle, as was well stated by the district court in its instructions, " \* \* \* is for the purpose of identification; that their ownership may be known and distinguished from other stock; that it may be known to whom the particular cattle belong." That stock may be identified in this manner, unless prohibited by a positive statute, is beyond dispute. Whether the testimony offered upon this point, in any given case, is sufficient to convince the mind, beyond a reasonable doubt, as to the ownership of the property, is a question of fact to be determined by the jury.

Hereafter, all controversies upon this point will be avoided; for the legislature, since the offense charged against appellant was committed, recognizing the difficulty that cattle-men in this state might have in identifying and proving ownership of their stock, and for the purpose of removing all doubts as to the admission of this kind of evidence, passed an "Act to regulate proceedings in certain criminal cases;" which, among other things, provides that, "upon the trial of any public offense which concerns any neat cattle, horse, mule, or other animal running at large upon any range in this state, the brand and other marks upon such animal shall be *prima facie* evidence of ownership." Gen. St. 4561.

2. Section 9 of the "Act to regulate marks and brands of stock," approved February 27, 1873, (Gen. St. 757-767,) provides that "no mark, brand, or counter-brand shall be considered as lawful if not recorded as specified in this act." Neither Carlin, Vail Bros., nor appellant had their marks and brands recorded as required by this act. Appellant contends that, under the provisions of section 9, the use by Vail Bros. of the marks and brands in question was unlawful; that the proof of their ownership of the cattle by such marks and brands was insufficient to establish even *prima facie* evidence of ownership. No objection was made in the court below to the admission of oral testimony to prove the marks and brands of the Vail Bros., and the only question in relation to this statute, which can be reviewed by this court, is whether or not the court erred in giving the following instruction:

"Considerable has been said in relation to the brands and marks of Vail Bros. not being recorded. I simply state that that is immaterial in this case. That question is out of the case entirely, for the reason that the object of the law in requiring cattle-men to record their brands is simply to give notice to other persons. If a person feloniously takes cattle, it is wholly immaterial whether the brands are recorded or not."

We are of opinion that the act referred to has no application to the facts of this case. The testimony was clear and positive that Car-

lin had, for years prior to the sale of his cattle to Vail Bros., used the marks and brands in question. If it should be conceded that, under the provisions of section 9, it was unlawful for Carlin or the Vail Bros. to use these marks and brands without having them recorded, still the fact remains that they did use them; and there is no provision in the statute which prohibits them, in a case like this, from identifying their cattle by such marks and brands, and having such identity considered as testimony tending to prove their ownership.

The authorities cited by appellant from Texas must be construed with special reference to the statute of that state, which provides that "no brands, except such as are recorded by the officers named in this act, shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used." 1 Pasch. Dig. art. 4659. Under this provision, the courts of that state have decided that oral testimony of the brands was not permissible *as evidence of ownership*; but was admissible, in connection with other evidence, *for the purpose of identifying the cattle*. *Hutto v. State*, 7 Tex. App. 47, and authorities there cited. It has also been held in that state, notwithstanding the provisions of the statute requiring the marks as well as the brands to be recorded, that the unrecorded marks were competent evidence to prove the ownership of animals alleged to have been stolen, because the prohibition in the section we have quoted is confined to *brands* alone. *Johnson v. State*, 1 Tex. App. 345. These authorities, instead of being opposed to the views we have expressed, fully sustain the conclusion we have reached, that the statute of 1873 has no application to this case. See, also, *Dixon v. State*, 19 Tex. 134; *Poage v. State*, 43 Tex. 455; *Kelly v. State*, 1 Tex. App. 634; *State v. King*, 84 N. C. 737.

Suppose the court did err in stating that the object of the statute, in requiring cattle-men to record their marks and brands, is *simply* to give notice to other persons, how could such an error, upon an immaterial point, prejudice appellant? The court correctly stated one of the objects which the legislature had in view in passing the statute; but it need not have stated any of the objects of the law. If the statute was inapplicable, the court was not called upon to construe it. It may, therefore, and it will, be admitted that in civil cases, between stock-owners having the same brands and marks, where one party has his brands and marks recorded, and the other not, or in other civil cases requiring a construction of the entire statute, it might be a material error for the court to limit the objects of the statute to the one stated in the instruction; but in the case at bar it was wholly immaterial. The only purpose and effect of the instruction was to call the attention of the jury to the fact that the statute in question had no application, and that the question whether Vail Bros. had their brands and marks recorded was *immaterial in this case*. To this extent the instruction was correct. The fact that the reason given for the conclusion reached was incorrect was a

harmless and immaterial error, which could not possibly have misled the jury, or in any manner prejudiced appellant.

3. It is next claimed that the court erred in giving this instruction:

"There is another question. The Vail Bros. have not demanded of Mr. Hancock the cattle sold by defendant to him, and they have not demanded of Zeigler Bros. payment for the cattle sold by defendant to them. These are matters resting entirely with the Vail Bros., as it is their own business, and does not affect the case at all. They are claims optional with them whether they will enforce or waive."

There is no valid objection to this instruction. It stated the law correctly. Neither the guilt nor innocence of the defendant, the ownership of the cattle, or credibility of the witnesses, depended in any manner upon the question whether Vail Bros. had demanded payment or possession of the cattle from the persons who had innocently purchased and paid for them from the defendant.

4. The court did not err in refusing to give the instructions A, B, and C, requested by appellant, as it had, of its own motion, given clear, concise, comprehensive, and correct instructions, covering all the points embodied therein.

The judgment of the district court is affirmed.

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(19 Nev. 331)

ROBINSON v. BENSON.

Filed April 3, 1886.

1. NEW TRIAL—TRIAL BY COURT—MOTION—TIME OF NOTICE.

In a case tried without a jury, the decision of the court is distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment.

2. SAME—DISPOSITION OF MOTION NOT MADE WITHIN PROPER TIME.

Where the statement on motion for a new trial has not been served or filed within the time required by statute, or within the time specified by stipulation, it must be disregarded.

3. SAME—STATEMENT ON MOTION FOR NEW TRIAL NOT EFFECTIVE AS STATEMENT ON APPEAL.

A statement which has been prepared exclusively as a statement on motion for a new trial, cannot be considered as a statement on appeal from the judgment.

Appeal from judgment of Sixth district court, Eureka county, entered in favor of the defendant.

*H. K. Mitchell*, for appellant.

*Baker & Wines*, for respondent.

HAWLEY, J. This cause was tried before the court without a jury. The opinion of the court ordering judgment in favor of defendant, Benson, was filed April 11, 1885. Notice of the filing of the opinion was served upon plaintiff's attorney the same day. On the eighteenth of April plaintiff served and filed notice of motion for a new trial. On the same day a stipulation was filed giving plaintiff 10 days after the statutory time to file and serve his statement on motion for new trial. On the eight of May the court filed its findings

of fact and conclusions of law, and the judgment in favor of defendant was thereupon regularly entered. No written notice of the findings was given to plaintiff's attorney. Thereafter, on the eighteenth of May, 1885, plaintiff served and filed another notice of motion for a new trial, and on the same day served and filed a statement on motion for a new trial. This appeal is taken from the judgment, and from an order of the district court denying a new trial.

Was the statement on motion for a new trial filed and served within the time required by statute? In *Elder v. Frevert* it was held that the decision of the court was distinct from the findings, and that the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment. 18 Nev. 283, and 3 Pac. Rep. 237. The second notice of motion for a new trial was not given "within ten days after receiving written notice of the rendering of the decision of the judge," (Pr. Act, § 197; Gen. St. 3219;) hence no rights whatever were acquired thereby. It therefore follows that the statement on motion for a new trial, not having been served or filed within the time required by statute, or within the time specified in the stipulation, must be disregarded.

Defendant, having made this objection at the time of proposing amendments to the statement, did not waive his right to make the same objection in this court. Hayne, New Trial, § 146, p. 409. The statement, having been prepared exclusively as a statement on motion for a new trial, cannot be considered as a statement on appeal from the judgment. *Williams v. Rice*, 13 Nev. 234; *Nesbitt v. Chisholm*, 16 Nev. 40.

There is no error in the judgment roll.

The judgment of the district court is affirmed.

## SUPREME COURT OF KANSAS.

(35 Kan. 85)

WINN v. ABELES.

Filed April 9, 1886.

## 1. EASEMENT—BUILDING BEYOND LINE—ADVERSE POSSESSION.

Where the owner of a city lot undertakes to erect a building upon his own ground, but, by inadvertence and ignorance of the true line of his lot, places a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterwards to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken will not be adverse.

## 2. SAME—RIGHT TO LATERAL SUPPORT OF SOIL.

While an owner is entitled to claim that his land shall have lateral support of the soil of the adjoining land, this right is limited to the soil in its natural condition, and does not include anything which may be placed thereon which sensibly increases the burden.

## 3. SAME—RIGHT TO EXCAVATE SOIL.

The fact that a land-owner has erected a building upon the verge of his lot will not preclude an adjacent lot-owner from excavating to the usual depth, and to the extreme limits of his lot, preparatory to the erection of a building thereon, nor make him liable for any damage thereby occasioned to his neighbor's building, providing the excavation is made with reasonable skill and caution, and with no improper motive.

Error from Leavenworth county.

*Thomas P. Fenlon*, for plaintiff in error.

*Lucien Baker*, for defendant in error.

JOHNSTON, J. Simon Abeles leased to T. H. Winn lot 9, in block 49, in the city of Leavenworth, upon which there was a one-story brick building, for the term of two years, commencing August 1, 1881. Winn took possession at once, and used the building as a dry-goods and notion store, and occupied it for that purpose until the building fell on April 4, 1883. The falling of the building injured his stock to some extent, and made it necessary to remove the same to another location. Winn thereupon brought suit against Abeles, charging that he wrongfully and negligently permitted and caused the soil to be excavated and moved from the west side of lot 9, without leaving sufficient support to the building, thereby causing its fall, in consequence of which he alleged he was damaged to the extent of \$2,801.50, for which he asked judgment. The answer of the defendant was a general denial. At the trial it was shown that the lot adjoining on the west, which was known as lot 10, was owned by one John F. Colyer, by whom it had been owned since 1863. He had erected a brick building on the lot in 1864, which remained there until January, 1883, when he removed it, preparatory to the erection of a large new building. The building upon lot 9 in which the plaintiff was doing business was erected about 1865, and had been placed from two to four inches over upon lot No. 10, but the fact that it extended beyond the west line of lot 9 was not discovered or known until about the time

that the building fell. In February, 1883, Colyer began an excavation on his lot for the building he proposed to erect, digging the full width of the lot, and to the depth of seven feet. Soon afterwards Abeles became apprehensive that the excavation would injure his building, and so notified Colyer; but, notwithstanding this, Colyer continued to excavate up to the east line of his lot. On March 14, 1883, Abeles entered into a contract with Colyer by which it was agreed that a party-wall should be constructed upon the dividing line between lots 9 and 10, which provided at length for the manner in which it should be done, and how the expense should be apportioned; and it contained a provision looking to the protection of the west wall of Abeles' building. Testimony was offered tending to show that when Abeles observed that his west wall was endangered by the action of Colyer, he proposed to Winn to protect him, as well as the building, by the erection of a temporary wall, and that, although the plaintiff knew of the danger occasioned by the excavation, he refused to permit Abeles to thus protect the building. Under the agreement, the excavation was begun for the purpose of putting in a party-wall, and some supports were put under the west wall of Abeles' building; but because they were insufficient, or by reason of an unusually strong wind, or for some other reason, the wall fell. The jury made special findings upon questions that were submitted, and also found generally in favor of the defendant. Complaint is made of the instructions; and counsel for plaintiff says that the question presented for review is whether the defendant had any right to permit the excavation to be made, or to enter into a contract for the construction of a party-wall during the term of the plaintiff's lease.

Under the lease, the plaintiff was, of course, entitled to the quiet enjoyment of the leased premises, without unnecessary interference from the defendant; but if an emergency arose during the term of the lease which made it necessary that something should be done to preserve the building from destruction or material damage, and which did not occur through the fault of the landlord, he would have a right to do whatever was reasonably necessary to preserve it from destruction or injury. This was the ruling of the trial court, and it is not combated by the plaintiff. He contends, however, that no cause which would justify the interference of the defendant had arisen. His claim is that the building having stood over upon lot 10 for more than 15 years, the title to that part occupied by the building, by virtue of the statute of limitations, vested in Abeles; and therefore Colyer had no right to excavate under the wall beyond the limit of lot 10, and that Abeles had no right to apprehend an encroachment, or to consent to an interference with the wall as it stood. The court below proceeded upon the theory that Colyer owned and had the right to use all of lot 10, and the question therefore arises whether the occupancy of a portion of the adjoining lot by the building is such a possession as would ripen into a title in favor of Abeles. Undoubt-

edly the strip had been occupied by the Abeles building for more than 15 years; but possession alone is not sufficient to confer title. The holding must be hostile and adverse as against the true owner. There must, in addition to actual possession, be an intention of the party in possession to claim the land as his own. The occupancy of Abeles was not taken under color or claim of title, nor was there any purpose to oust or dispossess Colyer. The undisputed facts show that Abeles had no knowledge that his building extended beyond the boundary line of his lot until about the time that this controversy arose. He supposed his building rested entirely upon lot 9, and made no claim to any portion of the adjoining lot, and he is here now asserting that he does not own or claim the narrow strip of lot 10 upon which his wall had inadvertently been placed. Colyer was equally ignorant that the building of Abeles extended beyond the dividing line of the lots. No survey had been made, and it does not appear that there was any agreement that the line to which the wall extended should be taken as the true line. It will thus be seen that there was no adverse possession. One of the essential requisites to obtaining title through the statute of limitations was wanting, viz., the intention of Abeles to claim the land exclusively and as his own.

"Mere occupation by inadvertence or mistake, without any intention to claim title, may not be a disseizin; as where a fence is erroneously erected not on the dividing line." *Abbott v. Abbott*, 51 Me. 575. In *St. Louis University v. McCune*, 28 Mo. 481, an alleged encroachment beyond the boundary line was under consideration, and the court held that if the party erected an improvement accidentally upon the land of another, through mistake or ignorance of the correct line dividing the tracts, and without intending to claim beyond the true line, the occupation thus taken, and the possession which followed, did not work a disseizin. In *Hitchings v. Morrison*, 72 Me. 331, a case where a party claimed title to a strip upon an adjoining lot upon the basis of adverse possession, it was held that if the occupation was not accompanied by a claim of title in fact, but was merely inadvertence or mistake as to the extent of his line, without intention to claim title to the extent of his occupation, but only to the bounds described in his deed, then it was not adverse, and would not give title. In *Howard v. Reedy*, 29 Ga. 152, it was held that a possession originating in and continuing under a mistake or misapprehension as to the true lines dividing two lots of land will not ripen into statutory title. The current of the authorities runs in the same line. *Bicker v. Hibbard*, 73 Me. 105; *Brown v. Cockerell*, 33 Ala. 38; *Enfield v. Day*, 7 N. H. 457; *Riley v. Griffin*, 16 Ga. 141; *Brown v. Gay*, 3 Me. 126; *Walbrunn v. Ballen*, 68 Mo. 164; *Sedg. & W. Trial of Title to Land*, §§ 759, 760; *Tiedeman*, Real Prop. § 699.

Counsel for plaintiff insists, if the occupancy continued during the statutory period, it will constitute an adverse holding, even if the building was extended over the boundary line through a mistake, and

cites *French v. Pearce*, 8 Conn. 439, and some other authorities, to sustain his position. The authorities which he cites do not go to the extent claimed. It is evident from the foregoing authorities that, in a question of boundaries, possession does not count for as much as where the whole tract is held adversely against a claimant. The authorities which he cites only go to the extent of holding that property occupied by a mistake, and which is claimed by the occupant as his own, will constitute an adverse possession. None of them hold that the intention to appropriate the property occupied as that of the occupant can be dispensed with. In *French v. Pearce*, *supra*, so much relied on by counsel, it was expressly held that the intention of the possessor claiming adversely is an essential ingredient, and that the person entering upon the land under a mistake must actually hold it as his own. The same court, at a later day, in passing upon a case where a division fence between the lands of A. and B. was a stone wall three feet wide, set wholly on the land of A., and B. had for more than 15 years held exclusive possession of his own land up to the wall, treating the center of the wall as the dividing line, and believing it to be so, but with no knowledge of such claim on the part of A., and with no other possession of the ground covered by the wall, held that there was not a sufficient adverse possession to vest in B. a title to the center of the wall. *Huntington v. Whaley*, 29 Conn. 391. It follows from these authorities, and the undisputed testimony, that the accidental and inadvertent encroachment upon the four-inch strip of Colyer's lot will not constitute an adverse possession.

It is further urged in behalf of the plaintiff that the Abeles building having stood for 20 years or more upon the land of another gave its owner a prescriptive right in such land for the support of his building. The old rule respecting ancient buildings invoked by the plaintiff, and which is said to be in analogy to the rule as to ancient lights, is a doctrine unsuited to the condition of things existing in this country, and which it has been decided cannot be recognized or made applicable here. *Lapere v. Luckey*, 23 Kan. 534; *Hieatt v. Morris*, 10 Ohio St. 523; *Wood, Nuis.* § 200. Much of the argument made in support of the claim that Colyer had no right to excavate to the extreme limits of his lot is based upon the theory that the west wall of the Abeles building was a party-wall, which it appears was not the fact. The wall was entirely separate and independent of any other structure on lot 10, and the owner of that lot had never owned lot 9, or contributed towards the construction of the wall, nor had either of the parties ever treated or regarded it as a party-wall. It was built upon the surface, did not extend the full length of the lots, and had none of the characteristics of a party-wall; and the rules relating to party-walls do not, therefore, apply.

Colyer was the absolute owner of all of lot 10, and had entire dominion over the same, both above and below the surface, limited only by the rule that he should so use it as not to injure the property or

impair the existing rights of others. It is insisted that the rule last mentioned gave Abeles the right to the support of the soil of lot 10 for his wall, a support which could not be disturbed by excavations. This contention is certainly not sound. Abeles was entitled to the lateral support of the soil of the adjoining lot. But this right did not extend to the support of the buildings which he might have placed on his lot. The right extends only to the soil, and does not include anything placed thereon which sensibly increases the pressure. A person cannot be deprived of the use of his land for ordinary and legal purposes by reason of the fact that an adjoining land-owner may, before that time, have erected a structure upon his land. It has been held that a man who builds a house adjoining his neighbor's land should foresee the probable use by his neighbor of the adjoining land, and by an agreement, or by a different arrangement of his house, secure himself against future interruption and inconvenience. *Thurston v. Hancock*, 12 Mass. 220. The reason for the rule has been stated to be "that if one land-owner sees fit to erect a house at the confines of his own land, it is his own folly, and he cannot, by being prior in point of time, prevent his neighbor from building there also; and the only restriction imposed upon the adjacent owner is that he must not negligently or carelessly excavate upon his own land; but if he proceeds with ordinary care, he will be excused from liability, no matter how great the damage of his neighbor's buildings." Wood, Nuis. § 185.

It seems to be well settled by the authorities that where an excavation is made by a lot-owner for an ordinary and proper purpose, which does not extend beyond the limits of his own land, and which is not done unskillfully, negligently, or with improper motives, that an injury occasioned to the building upon the adjoining lot is *damnum absque injuria*. *City of Quincy v. Jones*, 76 Ill. 231; *Charles v. Rankin*, 22 Mo. 566; *Panton v. Holland*, 17 Johns. 92; *Shrieve v. Stokes*, 8 B. Mon. 453; *Railroad Co. v. Reaney*, 42 Md. 117; *Rockwood v. Wilson*, 11 Cush. 221; *McGuire v. Grant*, 25 N. J. Law, 356; *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195; *Foley v. Wyeth*, 2 Allen, 131; Washb. Easem. 521; 1 Suth. Dam. 3. There are numerous other authorities which go to the same extent, many of which are referred to in those that have been cited, and it is universally held in all that, in cases like the present one, only reasonable care and diligence is required of the party making the excavation. Where there is a building upon the adjoining lot which may be injured by the excavation, it would ordinarily be the duty of the party to give the owner of such building sufficient notice, so that he might adopt means for its protection. Here the excavation was made for a proper purpose, and not to an unusual depth; and whether it was done with ordinary care and diligence has been submitted to the jury, and resolved in favor of the defendant. Both Winn and Abeles had ample notice that the excavation was to be made; and it may be remarked

that the jury found that, about the time the excavation was begun, Abeles proposed to Winn to put in a temporary wall that would prevent any damages in case the west wall of the building should fall, and that Winn refused to give his consent. He is therefore in no position to complain, and neither of the positions which he has advanced in argument can be sustained.

It is finally urged that the court erred in permitting Abeles to testify that he acted under the advice of E. T. Carr, who was an architect, in the steps taken to protect his building. The jury specially found that Mr. Carr was a skillful and competent architect, and also that the wall which was the subject of agreement between Abeles and Colyer was reasonably necessary for the protection of the building occupied by Winn. In determining what action he should take to protect the building it was proper for Abeles to consult a practical and skillful man who had had experience in such matters, and to regard his advice in the means employed to accomplish his purpose. The testimony complained of was therefore competent to prove that he acted with reasonable caution, and with good faith in the steps taken by him.

We think there should be an affirmance of the judgment rendered by the district court.

(All the justices concurring.)

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(35 Kan. 162)

**MORGAN v. FIELD.**

Filed April 9, 1886.

**1. TRIAL—JURY TRIAL—FORECLOSURE OF MORTGAGE—ACTION ON NOTE.**

A jury trial cannot be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same, where the pleadings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due.

**2. MORTGAGE—FORECLOSURE—EQUITABLE TITLE.**

Where the mere nominal and legal title to a tract of land is conveyed without consideration, and with the intention and understanding that the real title and interest thereto shall remain in the grantor, who, for a period of more than eight years thereafter, and until his death, continued in possession and cultivated and treated it as his own, paying the taxes and making valuable and lasting improvements thereon, and the grantee, although living in the immediate vicinity, made no claim to the possession of the land, or to the rents and profits of the same, and did not pretend to own or to exercise any supervision or control over it until after the death of the grantor, *held*, that the full equitable title to the land was in the grantor at the time of his death, and that the same may be sold to satisfy a mortgage previously given thereon by such grantor.

**Error from Saline county.**

Action by Lyman Field against Thomas Riordan, as administrator of the estate of Dennis Morgan, deceased, to recover upon a promis-

sory note executed by Dennis Morgan in his life-time, on, to-wit, September 10, 1879, and to foreclose a mortgage given at the same time by Morgan upon a certain 80-acre tract of land to secure the payment of said note. P. J. Morgan, who, it was alleged, claimed some right or interest in the mortgaged premises, was made a defendant. The administrator made default, but P. J. Morgan answered for himself, alleging that he was the owner in fee-simple of the mortgaged premises, and seized of a good and indefeasible title to the same, derived through conveyances from Dennis Morgan to John G. Spivey on the fourth day of November, 1873, and by John G. Spivey and wife to himself on the sixth day of November, 1873, which deeds were duly acknowledged by the respective parties, and immediately recorded. The plaintiff replied, admitting the execution of the deeds mentioned by the defendant, but averred that the same were executed without consideration; that it was never intended by and between Dennis Morgan and P. J. Morgan, or between J. G. Spivey and P. J. Morgan, that the ownership of the land should be changed from Dennis Morgan to P. J. Morgan; and that Dennis Morgan, ever after the execution of the deed and until his death, remained in the actual possession of the land, and continued to exercise acts of ownership over it, and to receive all the profits and benefits thereof, without let or hindrance from P. J. Morgan, who resided in the vicinity of said land, and never made any claim thereto. The plaintiff further alleged that he took the mortgage from Dennis Morgan as security for a loan of money, without any actual notice of the deed to P. J. Morgan, and believing that Dennis Morgan was the real and sole owner of the land. When the trial was had, P. J. Morgan demanded a jury, which was refused, and the cause submitted to the court, when the following findings of fact and conclusions of law were made:

"(1) That the note and mortgage set up in plaintiff's petition were, of their date, duly executed by the deceased Dennis Morgan, in his life-time, and for a valuable consideration; that there is now due on them to the plaintiff a balance of \$—— from the estate of said deceased.

"(2) That said deceased was in the fall of 1873, in his life-time, engaged in litigation, and to save his property from the result of the same, if it should go against him, and for no other consideration, unless it was an attorney's fee of \$25, gave to his then attorney in said litigation, J. G. Spivey, Esq., and against his wish, a warranty deed to the tract of land mentioned in the petition and mortgage set up therein.

"(3) That in a few days thereafter said attorney's fee of \$25 was paid, and, by request of said deceased, said Spivey and wife then conveyed, by warranty deed, said tract to the defendant herein, P. J. Morgan, the own brother of the deceased, which conveyance was without any consideration whatever, and only in pursuance of the aforesaid plan to cover up his property, and to save it from being taken in the event of a judgment against him in said litigation; that all the parties to said transfer intended the real title and interest in the said land should remain in the deceased, and the full equitable title did so remain.

"(4) That said deeds were duly, in the month of their execution, filed for record and recorded in the register of deeds' office of Saline county, Kansas,

but the plaintiff had no actual notice of this fact at the time of receiving this mortgage.

"(5) That said Dennis Morgan remained in possession of said land, residing upon and cultivating and improving it up to the time of his death, and the defendant, P. J. Morgan, has had possession since his brother's death.

"(6) That the personal estate of said deceased is exhausted, and all debts paid, save this to this plaintiff; that said Morgan died June 9, 1881."

"CONCLUSIONS OF LAW.

"(1) That the deed to said land to defendant, P. J. Morgan, is void as to this plaintiff, and the mortgage of plaintiff a valid lien thereon; (2) that the plaintiff is entitled to have his mortgage foreclosed, and the land sold to satisfy his claim."

Following the findings, the district court gave judgment in favor of the plaintiff, decreeing a foreclosure and sale of the land, and P. J. Morgan prosecutes this proceeding in error to obtain a reversal of that judgment.

*John Foster*, for plaintiff in error.

*Garver & Bond*, for defendant in error.

JOHNSTON, J. The ruling of the court refusing the demand for a jury trial made by P. J. Morgan is assigned for error. In his petition Lyman Field set forth a promissory note, and asked for a recovery of the amount due thereon, as well as the foreclosure of the mortgage executed to secure the same; and if issue had been joined upon the demand for money, a jury trial should have been awarded, as was decided in *Clemenson v. Chandler*, 4 Kan. 558. But no issue of fact was joined upon that question. The administrator of the estate of Dennis Morgan, deceased, made default, and the plaintiff in error did not deny the execution of the promissory note, nor question the right of the defendant in error to recover the amount claimed by him. The pleadings therefore admitted the allegations respecting the promissory note, and the right of defendant in error to recover judgment for the amount claimed, and left nothing to be tried except his right to have the mortgage foreclosed and the lands sold in satisfaction of his claim. The issues joined between the defendant in error and P. J. Morgan were therefore purely equitable in their character, upon which a jury trial cannot be demanded as a matter of right. *McCardell v. McNay*, 17 Kan. 434; *Woodman v. Davis*, 32 Kan. 344; S. C. 4 Pac. Rep. 262.

The action of the court holding that the mortgage executed by Dennis Morgan in his life-time should be foreclosed, and the land sold in satisfaction of the claim for which the mortgage was given as security, is complained of. About six years before the execution of the mortgage the same land was conveyed by Dennis Morgan to John G. Spivey, and by Spivey conveyed to P. J. Morgan. It is apparent, however, from the findings of the court that the conveyance to Spivey was voluntary and against his wish, and that the deed from Spivey and wife to P. J. Morgan was without any consideration, and that

all of the parties to the conveyances intended that the real title and interest in the land should remain in Dennis Morgan. There was no actual transfer of the land by Dennis Morgan, nor did he part with its possession and control. The understanding of the parties was that the transfer was entirely nominal, and that the equitable title should be reserved to Dennis Morgan. Only a bare legal title was conveyed to P. J. Morgan, by whom it was to be held in trust for Dennis. It is true, there was no express trust, the conveyance being absolute in form, and that something more than a mere parol agreement was necessary to create the trust, and to reserve to Dennis Morgan the equitable title. It appears that, connected with the parol agreement or understanding, there were other facts and circumstances which it seems to us fully establish the trust. As we have seen, there was no change of possession. Dennis Morgan continued to reside thereon, cultivate, and treat the land as his own from the time of the conveyance until his death,—a period of more than eight years. During all this time the taxes thereon were paid by him, and he also plowed considerable of the land, planted and cultivated apple and peach trees thereon, and made other lasting and valuable improvements, treating it as his own in all respects, as he had done prior to the conveyance to his brother. Although P. J. Morgan resided in the immediate vicinity of the land, no claim was made by him to it; he never claimed rent, nor offered to pay taxes, nor undertook to obtain possession; and the probate judge testifies that, after the death of Dennis Morgan, when the plaintiff came to take out letters of administration upon the estate of his brother, he admitted that the land in controversy was the property of the estate. It seems that soon after the deed was made to P. J. Morgan he returned the instrument to his brother, and there is some ground for the claim of counsel for defendant in error that it was understood between the plaintiff in error and his brother that any claim which the former might have set up under his deed was extinguished by the return of the instrument. Under all the facts in the case we cannot doubt that the full equitable title to the land was in Dennis Morgan when the mortgage was executed and at the time of his death, and that the same is subject to the payment of his debts.

We cannot sustain the objection of the plaintiff in error that the findings are not justified, as a careful reading of the testimony satisfies us that it sufficiently supports the result reached by the court. Nor can we disturb the judgment on account of the refusal of the court to restrict the cross-examination of the plaintiff in error. It did take a wide range, but it must be remembered that it was an examination of a party to the action, and the other party to the transaction inquired about was dead. Possibly some of the questions asked were somewhat remote from the matters inquired about in the examination in chief, but they were mostly explanatory of the testimony given upon the direct examination; and, as the trial was be-

fore the court alone, we do not think the plaintiff was prejudiced by the extended inquiry.

The judgment and decree of the district court will be affirmed.  
(All the justices concurring.)

(35 Kan. 66)

GRAY v. CROCKETT and others.

Filed April 9, 1886.

1. WITNESS—COMPETENCY—DISTRICT JUDGE.

A district judge is not competent as a witness in a cause tried before him.

2. ACTION—CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.

A district judge ought not to change the place of trial of a civil action, except for cause true in fact and sufficient in law, and the cause for such change should be made to clearly appear to the court; but when an affidavit for a change of venue is presented which is general in its terms, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is so disqualified, cannot be declared erroneous.

3. SAME—AFFIDAVIT—JUDGE A MATERIAL WITNESS.

Where a party to a civil action makes an application to the district court for a change of venue, and files an affidavit in support thereof, upon the ground that he is advised by his attorney that the district judge is a material witness in his behalf upon the trial; that he believes such advice to be true, and desires the evidence of the judge at the trial, and intends to procure the same if a change of venue is granted; and the district court upon such application, affidavit, and its own personal knowledge, transfers the case to another district for trial,—the order is not erroneous; but if the district court, upon such affidavit so general in its terms, had overruled the application, the supreme court would not have disturbed the ruling.

4. ESTOPPEL IN PAIS—FAILURE TO DISCLOSE INTEREST IN LAND SOLD.

If one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterwards try to assert his title.

5. SAME—MARRIED WOMAN.

Where a married woman owned 33 acres of real estate within the limits of an incorporated city, upon which she and her husband lived, and one acre thereof was their homestead; and her title from her husband is not recorded, although the deed under which she claims was deposited with the register of deeds for record, but by him put away in a package where it remained over 20 years, and could have been found only by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing it; and her husband enters into a written contract for the sale of the real estate, and the wife is present at the time of making the contract, heard its contents stated, knew the terms and conditions thereof, and did not dissent therefrom, except by expressing a desire that the deferred payments provided in the contract should draw 10 per cent. interest instead of 8; and after an action is commenced against her husband for the specific performance of the contract, to which she is a party, did not disclose her title for more than two years: *held*, she will be estopped from setting up title to the land, which is not a part of the homestead, to defeat a suit brought against her husband for the specific performance of his contract; and so will the grantee of herself and husband, if such grantee had no actual knowledge of the unrecorded deed, and dealt with the land at the time of the subsequent purchase as that of the husband, and had notice of the prior contract of sale.

Error from Douglas county.

Action brought March 3, 1882, by B. Gray against Elizabeth I. Crockett, H. C. Long, and Martha M. Long, his wife, to compel them

to convey to plaintiff certain real estate. The defendants filed the following answer, omitting court and title:

"*First.* They admit that said Elizabeth I. Crockett purchased the real estate described in said petition, but without any notice of the pretended contract set out in said petition, as alleged to be existing between said plaintiff and said defendant H. C. Long; and these defendants, further answering, say:

"*Second.* The said pretended contract set out in said petition is absolutely void, and of no legal effect, and that said plaintiff should not be allowed to have and maintain his action thereon, because they say that the said land described in said pretended contract was one entire body of land less than one hundred and sixty acres in amount, situated in Wyandotte county, state of Kansas, and not within the limits of an incorporated town or city, and was at the time of the signing of said pretended contract by said defendant H. C. Long occupied as a residence by the family of said H. C. Long and the defendant Martha M. Long, his wife; and these defendants aver that said Martha M. Long never did sign said pretended contract, and never in any manner assented thereto.

"*Third.* They deny each and every other allegation and averment contained in said petition."

The first trial was had at the July term of court for 1882. The court then decided the contract of April 22, 1881, void and of no effect, and rendered judgment for the defendants. The plaintiff brought the case here, and the judgment of the district court was reversed, and the cause remanded for a new trial. *Gray v. Crockett*, 30 Kan. 138; S. C. 1 Pac. Rep. 50. At the July term, 1883, of the court, Gray obtained judgment against the defendants, who brought the case here. That judgment was reversed, and the cause remanded for a new trial. *Crockett v. Gray*, 31 Kan. 346; S. C. 2 Pac. Rep. 809. On April 7, 1884, the defendants filed a motion for a change of venue, on account of the alleged bias and prejudice of the district judge, Hon. W. R. WAGSTAFF. This motion was overruled. The defendants then filed another motion for a change of venue, for the reason that the district judge, Hon. W. R. WAGSTAFF, was a material witness for the defendants upon the trial of the cause, and that the defendants desired to have his testimony. On May 2, 1884, this motion was sustained, and the cause sent to the district court of Douglas county for trial. Trial had at the April term of the district court of that county for 1884, and in the month of July of that year, a jury being waived. The court made the following conclusions of fact:

"(1) That at the time and place mentioned in plaintiff's petition plaintiff made with defendant H. C. Long the contract in said petition stated and set forth; that the lands in said petition described are the lands mentioned in said agreement, which was reduced to writing and signed by the parties thereto; (2) that H. C. Long was a married man, and with his wife lived upon said tract of land, which was situated within the city of Wyandotte, and one acre thereof constituted the homestead of H. C. Long and wife; (3) that at the time of the making of the aforesaid written agreement said Long's said wife was present, and heard the contract stated, and knew the terms and conditions thereof, and did not dissent therefrom, excepting that she expressed a desire that the deferred payments shall draw ten per cent. interest,

instead of eight per cent., as provided in said writing; (4) that she did not sign, and was not asked to sign, said contract, or to become a party thereto; (5) that no money was paid the said Long upon said contract, but at the time, or before the time, provided by said contract for the payment of money thereon the plaintiff offered to pay the first payment of money required to be paid thereon, which payment was refused by said Long, who declined to fulfill the same; (6) that said Long and wife, after the making of said contract, sold the said lands, so agreed by said H. C. Long to be sold to said plaintiff, to defendant Elizabeth I. Crockett, who, before purchasing the same, had notice of the prior sale thereof by H. C. Long to plaintiff, excepting that said Long did not sell to said Crockett one acre and seven-tenths thereof; (7) that the price paid for the portion of said lands purchased by said Crockett was \$8,500; (8) that in the year 1860, and on the thirteenth day of September of said year, said Long made a conveyance of the lands mentioned in the said contract of sale by H. C. Long to plaintiff to one R. L. Vedder, who received said conveyance from said Long, and took and delivered the same to the register of deeds of Wyandotte county for record, but did not pay the fee for recording the same; that said register of deeds received the said conveyance, and deposited the same, with other deeds, within his office, where the same remained until the same was found by the register of deeds of said Wyandotte county in the fall of the year 1883; (8½) that said deed was unrecorded by said register, and would have been found only by a person having such knowledge of the business management of said office as to induce an investigation of the package containing the same, being with other old and unrecorded deeds in said office; (9) that on the fourth day of December, 1860, said Richard L. Vedder conveyed said lands by deed, with warranty, to Martha M. Long, the wife of said H. C. Long, which conveyance was duly recorded in the office of the register of deeds of Wandotte county on the \_\_\_\_\_ day of \_\_\_\_\_, 1869; (10) that the plaintiff had no actual knowledge of either of said deeds from Long to Vedder, and from Vedder to Mrs. Long, until July, 1883."

And thereon the court made the following conclusions of law:

"(1) That at the time of the making of the contract of sale set out in the plaintiff's petition, Martha M. Long was the owner in fee-simple of the real estate in said contract mentioned and described; (2) that she is not estopped from asserting her ownership of or title to the same, and every part thereof, by reason of any act of hers suffered or done at the time or before or since the making of the contract between the plaintiff and H. C. Long set up by the plaintiff in this action; (3) that plaintiff in this action is not entitled to a specific performance of said contract; (4) that defendants are entitled to judgment in this action for costs, and it is so ordered."

The plaintiff excepted to all the findings of fact, and also to the conclusions of law. Judgment was entered in favor of the defendants for costs. Plaintiff excepted, and brings the case here.

*N. Cree, J. W. Green, and B. Gray*, for plaintiff in error.

*Stevens & Stevens and J. B. Scroggs*, for defendants in error.

HORROR, C. J. It is claimed by the plaintiff that the order directing the trial of this cause to be had in Douglas, instead of Wyandotte, county is void, and, if not void, is at least erroneous. The order was based upon the affidavit of H. C. Long, one of the defendants, setting forth "that he was advised by his attorney that Hon. W.

R. WAGSTAFF, the district judge, was a material witness for the defendants upon the trial; that he believed the advice to be true; and that he desired the testimony of the judge at the trial, and intended to procure the same if a change of venue was granted."

Section 56 of the Civil Code reads:

"In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist."

The contention is that a district judge is not "disqualified to sit," even if a material witness in a case, and that the affidavit upon which the order changing the place of trial to Douglas county was made was insufficient, in that it did not set out what the defendants expected to show by the judge, nor was it otherwise made to clearly appear that the judge was a material witness.

We do not think the order of the court void. A judge is not competent as a witness in a cause tried before him, for this, among other reasons: that he can hardly be deemed capable of impartially deciding upon the admissibility of his own testimony, or of weighing it against that of another. It is now well settled that the same person cannot be both witness and judge in a cause. 1 Greenl. Ev. (12th Ed.) § 364; *Ross v. Buhler*, 2 La. (N. S.) 312; 2 Bouv. Law Dict. 12. Therefore we think that where a judge is a material and necessary witness in a case, he is "disqualified to sit." If the district court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is that such facts and circumstances must be proved by affidavits, or other extrinsic evidence, as clearly show that the judge is a material and necessary witness, and unless this clearly appears, a reviewing court will sustain an overruling of the application. *City of Emporia v. Volmer*, 12 Kan. 622. The affidavit in this case for the change of venue should have disclosed how the attorneys obtained knowledge of the fact that the district judge was a material witness, and all the facts the defendants believed the judge would prove. This was not done; but, although the affidavit is deficient in this respect; we cannot wholly ignore the personal knowledge of the judge who transferred the case. A judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only, and no change of venue should be granted except for cause, true in fact and sufficient in law, and all of this should be made to clearly appear to the court; but when an affidavit is presented in general terms for such a change, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, can-

not be declared erroneous. *City of Emporia v. Volmer, supra; Edwards v. Russell*, 21 Wend. 68; *Moses v. Julian*, 45 N. H. 52.

The contract set forth in the petition is as follows:

"APRIL 22, 1881.

"Agreement between H. C. Long and B. Gray for sale of his farm of thirty-three acres, south side of Tauraume street, Wyandotte, for eight thousand dollars. Said Long agrees to sell the said farm for \$8,000, payable as follows: \$500 by the twenty-eighth of April inst.; \$1,500 in three months from date; and balance, \$6,000, in three years,—with interest at 8 per cent. Gray agrees to make payments as above, and pay Armstrong's commission, not exceeding \$100. Gray to have possession when \$2,000 is paid, and deed then to be given, and mortgage then given to Long for three years, at eight per cent. interest, with the privilege of paying the whole or part sooner.

"H. C. LONG.

"B. GRAY."

The principal and the important question involving the merits of this case arises upon the following finding of fact:

"At the time of the making of the written agreement Martha M. Long, wife of H. C. Long, was present, heard the contract stated, knew the terms and conditions thereof, and did not dissent therefrom, excepting she expressed a desire that the deferred payments should draw ten per cent. interest instead of eight per cent., as provided in the contract."

A further finding of the trial court is to the effect that Mrs. Long was the owner in fee-simple of the real estate in controversy; and, as a conclusion of law, upon all the facts found, the court decided that Mrs. Long was not estopped from asserting her ownership or title to the same by reason of any act of hers suffered or done before, at the time, or since the making of the written contract of April 22d. At the time of the execution of this contract Long and wife lived upon the land within the city of Wyandotte, and the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, under which Mrs. Long claims title, was unrecorded. It had been delivered to the register of deeds of Wyandotte county for record in the year 1860, but was placed with other deeds in a package, where it remained until found by the register in the fall of 1883. It could only have been found by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing the same. The written contract shows upon its face that H. C. Long sold the land as his own. It is indisputable that the plaintiff supposed he was dealing with Long as the owner of the land; and that both husband and wife were willing to sell is evident from the fact that they did shortly thereafter sell at an advance. Mrs. Long asserted no title to the premises until after the decision of this court, in June, 1883, that the land was within the limits of the city of Wyandotte, and therefore that only one acre thereof was exempt as a homestead. *Gray v. Crockett*, 30 Kan. 138; S. C. 1 Pac. Rep. 50. This was more than two years after the execution of the written contract. Upon the belief that Long was the owner of the land, the

plaintiff commenced his suit for a specific performance of his contract on March 3, 1882. This suit was prosecuted by him for over a year without Mrs. Long making her title known, and the money and time of the plaintiff was expended in his attempt to obtain the conveyance which H. C. Long had agreed to execute. When the case was tried at the July term of the court for 1882, it was admitted by all the parties, for the purposes of the trial, that on April 22, 1881, H. C. Long was the owner of the land described in the contract.

Upon the findings of fact, we think Mrs. Long is estopped, in equity, from now asserting that at the time of the contract between the plaintiff and her husband she was the owner of the premises described therein. Questions relative to estoppel are not, in general, controlled by technical rules, but are usually determined upon principles of equity and good conscience. Mrs. Long stood by and allowed the contract to be executed; to some extent she participated in the negotiations preliminary to the execution of the contract. Her silence as to her title, her acquiescence at the time of the contract, and her failure to disclose her title during the earlier stages of this litigation, invoke against her the familiar rule of justice, that if one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterwards try to assert his title. "He who will not speak when he *should*, will not be allowed to speak when he *would*." *Goodin v. Canal Co.*, 18 Ohio St. 169; *Tilton v. Nelson*, 27 Barb. 595; *Foster v. Bigelow*, 24 Iowa, 379; *Anderson v. Armstead*, 69 Ill. 452; *Thompson v. Sanborn*, 11 N. H. 201; *Ford v. Loomis*, 33 Mich. 121; *Beatty v. Sweeney*, 26 Mich. 217; *Dougrey v. Topping*, 4 Paige, 93.

Judge THOMPSON, in an article concerning estoppels against married women, says:

"If a married woman owns real property, but her title is not of record, and her husband enters into a contract for the sale of it, of which she is informed at the time, and to which she makes no objection, she will be estopped from setting up her title to the land to defeat a suit brought against her husband for specific performance of his contract, and so would her grantee." 8 South. Law Rev. (N. S.) 275-310; *Smith v. Armstrong*, 24 Wis. 446; *Catherwood v. Watson*, 65 Ind. 576.

We are of the opinion, therefore, that the conclusion of law of the trial judge that Mrs. Long was not estopped from asserting her ownership or title to all the premises in dispute is erroneous, and cannot be sustained.

It is again insisted that defendants are entitled to judgment, even though the homestead included only one acre, as the contract was for the entire tract at a price in gross, and not so much per acre; and as the homestead acre was inalienable by the husband alone, and was in no manner identified in the contract or its price determined, that there is no way of apportioning the price of the 32 acres which the

husband could sell. In addition to what is stated upon this point in the former opinion of this court in *Crockett v. Gray*, 31 Kan. 346, S. C. 2 Pac. Rep. 809, it appears to us from the record that H. C. Long and wife have no real complaint to make. Upon the trial the plaintiff offered these defendants the privilege of selecting their own homestead; therefore they will have the right to retain any acre of the land described in the contract which they may choose. The plaintiff only asks that his contract be enforced after these defendants select and retain one acre thereof. As was said by Mr. Justice BREWER, speaking for this court when the case was last presented to us for our determination, "It is equitable that the contract of April 22, 1881, be enforced so far as is possible, and not that the contracting party be permitted to avoid his contract obligations." When Mrs. Crockett purchased she had notice of the prior sale of the premises to plaintiff, and therefore acted with full knowledge of all his rights. *Meixell v. Kirkpatrick*, 33 Kan. 282; S. C. 6 Pac. Rep. 241. L. H. Wood was the agent for Mrs. Crockett, and when she purchased, on December 24, 1881, she had no actual knowledge of the deed from Long to Vedder of September 30, 1860. This deed was found by Wood in a package in the register's office about September 10, 1883; therefore Mrs. Crockett bought the land with ignorance of the title of Mrs. Long, and, like the plaintiff, supposed she was dealing with Long as the owner. After the first trial of this case Mrs. Crockett became afraid of her title, and desired to sell the land. L. H. Wood then negotiated a sale of it from her to his father-in-law, the latter paying the same price that Mrs. Crockett did, with interest on her money. As all of these sales were made through L. H. Wood, and as he acted as agent both for Mrs. Crockett and his father-in-law, and had notice of all the rights of plaintiff, the latter parties are charged with his knowledge. Wood, and the principals for whom he acted, dealt with the land as that of Long, upon the belief that the contract of April 22, 1881, could be avoided solely because the land described therein was outside of the limits of the city of Wyandotte, and therefore, being the homestead of H. C. Long and wife, could not be alienated without their joint consent. The attempt to set aside the contract of April 22, 1881, upon the ground that Mrs. Long was then the owner of the premises, is an after-thought, evidently not contemplated when the joint answer of the defendants was filed.

The statute provides that in cases decided by this court when the facts are found by the court below, this court will send a mandate to the court below directing it to render such judgment in the premises as it should have rendered upon the facts found. Under the statute, therefore, in view of the conclusion obtained, as none of the findings are excepted to by the defendants, the cause must be remanded, with directions to enter judgment for the plaintiff. Section 559, Code. Of course the plaintiff is only entitled to the enforcement of the contract of H. C. Long. He did not bargain for or purchase the *supposed*

*inchoate interest* of Mrs. Long. She did not sign the contract, and was not asked to sign the same. The plaintiff is entitled to what his written contract calls for. The decree, however, for the specific performance of the contract, as well on the part of H. C. Long as of Mrs. Crockett, must be so framed as to fully protect such inchoate interest of Mrs. Long, as the wife of H. C. Long, whether owned by herself, or, subsequent to the contract, transferred to her co-defendant Mrs. Crockett. The rights of the plaintiff are the same as though the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, had never been executed, and as though there had been no conveyance subsequent to the contract from H. C. Long to Elizabeth I. Crockett.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

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(35 Kan. 175)

ATCHISON, T. & S. F. R. Co. v. WILSON, Treasurer, etc., and others.

Filed April 9, 1886.

**TAXATION—ASSESSMENT—EQUALIZATION BY COUNTY BOARD.**

The county board of equalization is authorized, at its meetings held in the month of June of the odd years, when proper notice has been given, to correct and equalize the assessment made in those years, under section 69 of the tax law, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment.

**Error from Hodgeman county.**

*A. A. Hurd and M. W. Sutton*, for plaintiff in error.

*W. S. Kenyon and H. C. Peck*, for defendants in error.

JOHNSTON, J. In February, 1883, the boundaries of Hodgeman county were changed by legislative enactment so as to embrace considerable territory that had theretofore constituted a part of the unorganized county of Gray, and which before that time was not subject to taxation. The Atchison, Topeka & Santa Fe Railroad Company owned several tracts of land in the territory attached, and in the spring of 1883 the assessors of Hodgeman county assessed this land of the company, and it was placed on the tax-roll, and a levy was made thereon by the county commissioners of Hodgeman county for the taxes of that year. The railroad company brought this action against the county treasurer and county commissioners of Hodgeman county, alleging that the assessment was made without authority, and that the taxes levied upon its lands were wholly illegal and void, and asked for an injunction to restrain the collection of such taxes. A temporary injunction was granted. Afterwards the defendant filed a demurrer to the petition, which, upon the hearing,

was sustained, and the injunction dissolved. This ruling is assigned for error here. The validity of the tax is challenged by the plaintiff on the ground that the assessment of its land having been made in an odd year, it was not afforded a hearing or an opportunity to contest the justice of the assessment. We cannot concur in this claim. It is true that section 43 of the tax law provides for a biennial assessment of real property, but section 69 of the same law provides that "each township and city assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all the real property situated in the county that shall have become subject to taxation since the last previous listing of property therein, with the value thereof estimated agreeably to the rules prescribed for the listing and assessing of real estate, \* \* \* and shall make return thereof to the county clerk at the same time he is required by law to make his return of personal property," etc.

It is insisted that the board of equalization can only meet to equalize the assessment of real property in the even years when real property is regularly assessed, and therefore that the assessment of real property in the odd years provided by section 69 cannot be revised or equalized by the board. It is true that section 74 requires that there shall be a meeting of the board of equalization for that purpose on the first Monday in June of the even years, but it does not forbid a meeting at other times when there may be a necessity therefor. Section 73 reads as follows: "The board of county commissioners of each county shall constitute a county board of equalization, and the county clerk shall be the clerk of said board." This provision is broad and general, and, unless limitations are elsewhere prescribed, it would authorize the board thus constituted to equalize or correct the assessment of real estate at any time when proper notice had been given that such action could or would be taken. With respect to the equalization of the valuation of personal property, a limitation is prescribed in section 74, where it provides that the board "shall meet on the first Monday of June of each year, and proceed to equalize the valuation of the personal property of their county, and may adjourn from time to time for said purpose *not beyond ten days* from the first day of their session." Under this limitation it may well be doubted whether the board can meet for the purpose of equalizing the personal property valuations after the 10-days limit has expired; but when the legislature came to prescribe rules for the government of the board in regard to the time and manner of equalizing the valuation of real property, there was no such limitation made. The rules affecting real estate valuations are found in the same section with the limitation mentioned. The fixing of the limit in the one case, and the studied omission of such a provision in the other, indicates that the legislature did not intend to restrict the board, in correcting and equalizing the valuation of real property, to the meeting held on the first Monday of June of the even years. Besides, by section 75 it

is made the duty of the county clerk to give a newspaper notice in May of every year that the board will meet on the first Monday of the following month, and that at such meeting all persons feeling themselves aggrieved can appear and have all errors in the return corrected. As has been seen, the return made by the assessor in the odd year embraces, in addition to the listing and valuation of personal property, an assessment of all real property that has become taxable since the regular assessment of such property the preceding year. The notice is not that the errors in that part of the return relating to the valuation of personal property will be corrected, but that *all* persons may appear and have *all* errors in the return corrected. These sections, taken together, furnish authority to the board of equalization to correct any errors in the assessment of real estate made under section 69 in the odd years. That being so, that plaintiff had an opportunity for a hearing, and to contest the fairness and justice of the assessment. The judgment of the district court will therefore be affirmed. (All the justices concurring.)

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(35 Kan. 185)

ST. JOSEPH & W. R. CO. v. WHEELER.

Filed April 9, 1886.

1. CARRIER—PASSENGER RIDING ON CONSTRUCTION TRAIN.

W., a boy 18 years of age, asked and obtained leave to ride upon a construction train, from the conductor, who had been instructed by the railroad company not to permit passengers to ride on his train, but the instruction had not been communicated to W. The train had a caboose car attached, such as are attached to the freight trains of that road, and upon which passengers are carried. It also appeared that, notwithstanding the instruction mentioned, passengers were frequently carried on that and other construction trains. While W. was riding upon the caboose a collision with another train occurred through the negligence of the railroad company, which resulted in W.'s death. *Held* that, under the circumstances, W. was lawfully upon the train, and the company was held to the exercise of reasonable care and diligence towards him.

2. SAME—CUSTOM—PRESUMPTION.

It being customary to carry passengers upon the construction trains, persons having no notice of a contrary rule of the company had a right to assume that the conductor had authority to carry persons on such trains, and that the granting of permission by him fell within his general authority as manager of the train.

3. NEGLIGENCE—DEATH OF MINOR—DAMAGES.

In a suit to recover damages for the death of a minor, under section 423 of the Code, the fact that the parents had released to such minor his time and services during his minority may properly be considered by the jury in determining the amount of recovery; but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death.<sup>1</sup>

Error from Doniphan county.

*Doniphan & Reed*, for plaintiff in error.

*W. D. Webb*, for defendant in error.

<sup>1</sup> See note at end of case.

JOHNSTON, J. De Witt C. Wheeler, as administrator of the estate of Frank Wheeler, deceased, brought this action, under section 422 of the Civil Code, to recover damages for the benefit of the next of kin of Frank Wheeler, whose death it is alleged was caused by the gross carelessness and negligence of the St. Joseph & Western Railroad Company. There was but little dispute concerning the facts of the case. On June 17, 1881, the defendant below was operating a railroad which runs from Elwood westward, through Doniphan and other counties of Kansas, to Grand Island, Nebraska. On that day a work or construction train, with a caboose car attached, was sent from Elwood to a point near Troy for the purpose of being loaded with dirt to be brought back for the repair of the road-bed between Wathena and Elwood, with instructions to work until 10 o'clock in the morning without regard to train No. 7,—a freight train going west. While the train was being loaded, Frank Wheeler, in company with another boy, came up to the construction train, and, learning that it was soon going eastward, asked the conductor if he might ride back. The conductor consented, and Frank Wheeler rode in the caboose car with other persons that belonged to the train. He paid no fare, and was not asked or expected to pay any. Soon after he was taken on, the construction train backed eastwardly towards Wathena, and before reaching that place, and at 9.45 A. M. of that day, it collided with the engine of train No. 7 going westward, in which collision Frank Wheeler was killed. The conductor of the construction train had instructions from the railroad company not to allow persons as passengers to ride upon his train except those who belonged to it, but this instruction was not communicated to Frank Wheeler. Upon these and some other facts which were shown upon the trial a verdict for \$1,500 was given in favor of the plaintiff.

One of the questions raised is that there was no correspondence between the pleadings and the proof. The point is made that the plaintiff alleged that Frank Wheeler was a passenger, a term which it is claimed implied that Frank Wheeler was traveling in a public conveyance by virtue of a contract, express or implied, with the carrier as the payment of fare, or that which is accepted as an equivalent therefor, while the proof offered showed that he was carried on a train not designed for passengers; that no fare was collected or expected to be paid; and therefore that he did not stand towards the company in the relation of a passenger. This is one sense in which the term is used, but not the only one. It is commonly applied to any one who travels in a conveyance, or who is carried upon a journey, irrespective of the character of the conveyance or of compensation to the carrier. While the plaintiff alleged that Wheeler was carried as a passenger, he nowhere averred that he was carried for hire, nor can it be said that the petition was framed upon the theory that there was a contract relation between deceased and the company. It was rather upon the theory that he was not a trespasser upon the

defendant's train, and it is specially alleged that he was upon the train with the knowledge and consent of the conductor. From this averment it is manifest that the pleader did not rely upon any agreement between the company and Wheeler, and did not intend to hold the company to extraordinary care, as it would be held in carrying persons who were passengers in a strictly legal sense; but rather that, as Wheeler was upon a train with the consent of the conductor, he was not wrongfully there, and the company owed him the duty of ordinary care. The action was founded upon the neglect of the company, and not upon the breach of a contract; and allegations of the relation which he occupied towards the company are only material for the purpose of determining and fixing the grade of care owing to him by the company. As we interpret the petition, it did not allege that the relation of carrier and passenger existed by reason of an agreement between the deceased and the company, and therefore that there was no substantial variance between the pleadings and the proof.

A series of instructions were prepared by the railroad company, and disallowed by the court, and their refusal is assigned as error. Most of them in effect instructed a verdict in favor of the defendant, and asserted that the company cannot be held liable for injury to one who rides upon a construction train with the consent of the conductor, and who is not a passenger in the ordinary sense. They were properly refused. We concur with the view of the law taken by the trial judge, where he states that, "under the admitted facts and the evidence in the case, the said Frank Wheeler was not a trespasser upon defendant's train, although he was not in legal contemplation a passenger. A common carrier of passengers is bound to exercise extraordinary care towards its passengers, and is liable for slight negligence, but it does not owe the same degree of care to a person on one of its vehicles or trains who does not stand in the relation of a passenger. To such persons a carrier owes only the duty of ordinary care, which is that degree of care which persons of ordinary prudence would usually exercise under like circumstances."

It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company for two reasons: *First*, that the conductor had instructions not to carry passengers on the construction train; and, *second*, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true, the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instruction. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the

company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden, after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employe, the argument made by counsel might apply.

In *Dunn v. Grand Trunk Ry.*, 58 Me. 187, the plaintiff went on board a freight train, with the knowledge of the conductor. One of the regulations of the company prohibited conductors from allowing passengers to travel upon its freight trains. He was not directed or requested to leave, but paid the usual fare to the conductor, and during the journey the car upon which he rode was thrown from the track, and he was thereby injured. The court held that under the circumstances he had a right to suppose himself rightfully on board, and that, if the act of the passenger did not conduce to the injury received, the company was responsible for the consequences of its negligence or want of care.

*Chicago & A. R. Co. v. Michie*, 83 Ill. 427, was an action by the administratrix to recover damages for the death of her husband which occurred while he was riding upon an engine. The rules of the company provided that no persons, except the roadmaster and conductor of the train, were allowed to ride on the engine without the permission of the superintendent or master mechanic. He applied to the engine-driver, and was given permission to ride. It was ruled that the driver of the engine occupied only a subordinate position, and that his permission was not the permission of the company, as he had no power to give it; but it was added:

"Had the conductor of the train given the permission, or knowing the deceased was upon the engine, suffered him there to remain, it might be considered the act of the company, as the conductor has control of the entire train, and his act is rightfully regarded as the act of the company."

In case of *Wilton v. Middlesex R. Co.*, 107 Mass. 108, several young girls were invited by the driver to ride upon one of the defendant's cars. They got upon the front platform, and the driver immediately struck his horses, when, by reason of their suddenly starting, the plaintiff lost her balance and fell, so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car unless such authority was implied from the fact of his employment as driver. In deciding the case the court said:

"The driver of a horse car is the agent of the corporation having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duty, but is one within the general scope of his agency, for which he is responsible to his master. In the case at bar the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a tres-

passer. It is immaterial that the driver was acting contrary to his instructions."

In *Lucas v. Milwaukee & St. P. Ry. Co.*, 33 Wis. 53, it was held that if a person rode upon a freight train without authority from some person competent to give it, he would have been unlawfully there, and could not have successfully enforced the rights of a passenger against the company, but the company had authorized the carriage of passengers upon some of its freight trains, and therefore a different ruling was applied. It was stated that, "by making a portion of its freight trains lawful passenger trains, the defendant has, so far as the public is concerned, apparently given the conductors of all its freight trains authority to carry passengers, and if any such conductor has orders not to carry passengers upon his train they are or may be in the nature of secret instructions limiting and restricting his apparent authority, and third persons are not bound by such instructions until informed thereof."

In support of the same view, we cite *Jacobus v. St. Paul & C. Ry. Co.*, 20 Minn. 125, (Gil. 110;) *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9; *Gradin v. St. Paul & D. Ry. Co.*, 30 Minn. 217; S. C. 11 Amer. & Eng. R. Cas. 644, and 14 N. W. Rep. 881; *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Amer. & Eng. R. Cas. 249.

*Eaton v. Delaware & L. W. R. Co.*, 57 N. Y. 383, is relied upon as an authority for the position assumed by the company. The circumstances of that case are not like the one before us, and the decision is based on the special circumstances of the case. It differs materially in its facts from the one at bar. There the party injured was invited by the conductor to ride upon a freight train, with the promise to get him employment as a brakeman; and, besides, it did not appear that passengers were either habitually or occasionally permitted to ride upon the freight trains of that company. Here, although disputed, it was satisfactorily shown that passengers were not only occasionally but commonly carried upon the freight and construction trains of the defendant. A. J. Shuster, who was employed upon the construction train at the time that Frank Wheeler was killed, testified that passengers were carried upon that train under certain circumstances. Albert Hinchman, who had been on the train three or four months, stated that the company had always carried passengers on all its freight trains while he was upon the road, and that passengers had frequently ridden on the construction train, and had frequently been taken on at points other than stations where the train was at work. Henry Wheeler states that prior to the accident he rode upon the construction train to Wathena, and paid fare to the conductor for such ride. A. J. Mowry, who traveled a great deal upon defendant's road, testified that it was usual to carry passengers on all caboose cars; that he rode on every kind of train that was ever on the road, and had ridden on defendant's construction trains before June 17, 1881, and paid fare to the conductor. It will thus be

seen that it was customary for passengers to ride, with the permission of the conductor, upon all freight and construction trains upon the defendant's road, and the New York case, while similar in some of its features, is not an authority here. Persons not informed of the instructions given to the conductor had a right, under this prevailing practice, to assume that the conductor had authority to carry passengers on the construction train, and that the granting of permission by him in such cases fell within his general authority as manager of the train. Nor was there anything in the exterior appearance of the car in which the deceased rode to notify him that passengers were not carried therein. The testimony is that it was a caboose car similar in construction and appearance to those which were attached to all of defendant's freight trains, and upon which, as has been seen, passengers were carried.

The railroad company asked an instruction that if the father of Frank Wheeler had, prior to the accident, relinquished unto him the right to his time and services during his minority, and that this relinquishment was unrevoked at his death, the plaintiff can recover only nominal damages. It was properly rejected. In such an action the plaintiff does not sue for his own benefit, but only as the personal representative of the deceased. The damages recovered inure to the exclusive benefit of the widow and children if there are any, and if not, to the next of kin. In this case the damages were for the benefit of the next of kin, who were the father and the mother. The sum to be recovered was therefore not for the benefit of the father alone, who may have made the relinquishment, but for the mother also. Besides, parents may recover for the death of a child who has attained his majority if they can prove any pecuniary damages resulting therefrom, such as the loss of support. In estimating the pecuniary benefit which would accrue to his parents by the continuance of his life, the fact that the parents relinquished to Frank Wheeler his time and services during his minority was an element which might properly be taken into consideration, and this much was stated to the jury.

None of the other objections raised are at all tenable, and, as the charge given fairly presented the law of the case to the jury, the errors assigned will be overruled, and the judgment will be affirmed. (All the justices concurring.)

#### NOTE.

In the absence of a statute, damages cannot be recovered by a father for negligence causing the death of his minor son. *Sullivan v. Union Pac. R. Co.*, 2 Fed. Rep. 447.

No damage can be recovered by a father for the death of his minor son, clearly involving pecuniary loss by way of loss of his services, though the death was caused by the wrongful act of the defendant. *Sherman v. Johnson*, (Vt.) 2 Atl. Rep. 707.

In an action for negligently causing the death of a minor, the proper measure of damages, where the father is the next of kin, is the probable value of the services of the deceased from the time of his death until his majority, less the expense of his maintenance during the same time, *Mayhew v. Burns*, (Ind.) 2 N. E. Rep. 793; *Stafford v. Rubens*, (Ill.) 3 N. E. Rep. 568; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; and the jury may take into account the rea-

sonable expectation of pecuniary benefit from the continuance of the life even beyond majority. *Johnson v. Chicago & N. W. R. Co.*, (Wis.) 25 N. W. Rep. 223.

In an action to recover damages for death of a child caused by negligence, the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond majority. *Johnson v. Chicago & N. W. R. Co.*, (Wis.) 25 N. W. Rep. 223.

But where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, they will be entitled to nominal damages only. *City of Chicago v. Scholten*, 75 Ill. 468.

In an action by the administrator of a child for wrongfully causing its death, the plaintiff is not entitled to damages accruing prior to the time when such child would have attained its majority. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22.

In a statutory action to recover for death caused by negligence, when the next of kin, for whose benefit the action is prosecuted, were so related to the deceased as to be entitled to his services, or to support from him, (*e. g.*, the father of a minor son,) the law presumes some loss. It appearing that the deceased was a man engaged in active employment, presumably remunerative, and that he was nine months less than twenty-one years of age, a recovery might be had in behalf of the father of more than merely nominal damages. *Robel v. Chicago, M. & St. P. Ry. Co.*, (Minn.) 27 N. W. Rep. 305.

Where it appears that the death was caused by the negligence of the defendant, the next of kin may recover nominal damages without showing actual pecuniary loss. *Atchison, T. & S. F. R. Co. v. Weber*, (Kan.) 6 Pac. Rep. 877.

In an action by the personal representatives for an injury causing death, the damages are measured by the pecuniary loss, including deprivation of future pecuniary advantage occasioned thereby to those who take the benefit of the judgment. *Collins v. Davidson*, 19 Fed. Rep. 83. See *Beems v. Chicago, R. I. & P. R. Co.*, (Iowa,) 25 N. W. Rep. 693.

The amount of damages in an action by the next of kin is to be determined by the jury under the testimony submitted to them. *Johnson v. Missouri Pac. R. Co.*, (Neb.) 26 N. W. Rep. 347.

The measure of damages is the value of the life of deceased, having due regard to the capacity and disposition of such deceased person to be useful,—to labor and to save money. *Holmes v. Oregon & C. Ry. Co.*, 5 Fed. Rep. 523.

Where the party killed is the father of a family, the evidence may take a wide range, in order to give the jury the fullest insight into the family circumstances, to determine to what extent they have been injured by the loss of their head. *Staal v. Grand Rapids & I. R. Co.*, (Mich.) 23 N. W. Rep. 795.

Evidence of the amount of property deceased had acquired, his habits of industry, his ability to make money, and his success in business, is proper as a basis for estimating the amount of the damages. *Shaber v. St. Paul, M. & M. Ry. Co.*, (Minn.) 9 N. W. Rep. 575.

Damages for negligently causing the death of a married woman should be estimated on the same basis as though she were an unmarried woman. *Stuhlmiller v. Cloughly*, (Iowa,) 13 N. W. Rep. 55.

In the absence of a statute, damages cannot be recovered by a father for negligently causing the death of his minor son. *Sullivan v. Union Pac. R. Co.*, 2 Fed. Rep. 447.

In an action for negligently causing the death of a minor, the proper measure of damages, where the father is the next of kin, is the probable value of the services of the deceased from the time of his death until his majority, less the expense of his maintenance during the same time. *Mayhew v. Burns*, (Ind.) 2 N. E. Rep. 793; *Stafford v. Rubens*, (Ill.) 3 N. E. Rep. 568; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *City of Chicago v. Scholten*, 75 Ill. 468; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; and the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond majority. *Johnson v. Chicago & N. W. R. Co.*, (Wis.) 25 N. W. Rep. 223.

But where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, they will be entitled to nominal damages only. *City of Chicago v. Scholten*, 75 Ill. 468.

In *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22, it was held that in an action against a railroad company, by an administrator, for the death of a child, the plaintiff is not entitled to damages accruing prior to the time when such child would have attained majority.

(35 Kan. 193)

**McCUNE MIN. CO. v. ADAMS.**

Filed April 9, 1886.

**1. CORPORATION—ACTION—EVIDENCE—CHARTER.**

A copy of the charter of a corporation created under the laws of this state, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation.

**2. SAME—STOCKHOLDER—ACTION FOR SUBSCRIPTION.**

In an action by a mining company against a subscriber of stock for installments upon his subscription for stock of the corporation, such subscriber or stockholder cannot, in a collateral way, question the existence of the corporation or the regularity of its organization.

Error from Crawford county.

*Cowley & Wiswell*, for plaintiff in error.

*John T. Voss*, for defendant in error.

HORTON, C. J. This was an action commenced by the McCune Mining Company against W. B. Adams, before a justice of the peace of Crawford county, to recover from the defendant the sum of \$95, alleged to be due the plaintiff from the defendant upon his subscription to the capital stock of that company. Judgment was given before the justice against the plaintiff and in favor of the defendant, and an appeal taken to the district court. Upon the trial, after the plaintiff had produced all its testimony, the defendant demurred thereto, which demurrer was sustained by the court. Of this complaint is made.

It appears from the briefs before us that the district court decided that no testimony was introduced upon the trial showing, or tending to show, that the company had any legal existence as a corporation. The specific objection to the existence of the corporation is that it was not shown that the charter was subscribed by three persons who were citizens of this state. The plaintiff introduced in evidence a copy of its charter, duly certified by the secretary of state, and supplemented this testimony with proof of the election and qualification of the directors of the company, the adoption of by-laws by the company, and other evidence tending to show that the subscribers of the charter took all the steps supposed by them necessary to complete the incorporation. Stock was subscribed, assessments upon the stock were made, and notices of such assessments given to the stockholders. The stock-book of the company, offered in evidence, showed that the defendant, on January 18, 1884, subscribed for one share of the capital stock of the company, and attached his signature thereto. Notices were properly directed and mailed to him of the assessments upon the stock subscribed by him.

The statute provides that "a copy of the charter, or of the record thereof, duly certified by the secretary of state, under the great seal of the state, shall be evidence of the creation of the corporation." Section 9, c. 23, Comp. Laws 1879. Therefore it was unnecessary

to offer any evidence showing that the subscribers to the charter were citizens of the state. In addition to this, the defendant is estopped to deny the existence of the corporation at the time he contracted with it as such. A party cannot be permitted, in a collateral way, to question the regularity of the organization of a corporation. *Pape v. Bank*, 20 Kan. 440; *Rice v. Railroad Co.*, 21 Ill. 93; *Brookville, etc., Co. v. McCarty*, 8 Ind. 392; *Baker v. Neff*, 73 Ind. 68.

Thompson, in his excellent work on the Liability of Stockholders, says:

"If a person, when sued by a corporation, pleads *nul tiel corporation*, the production of the certificate of incorporation which has been filed, and proof of *user*, and possibly proof of *user alone*, will be sufficient evidence *prima facie* of the fact that it is a corporate body in fact as well as in name. The rule extends further: A person who has contracted with a body in writing, by a corporate name, when sued upon the instrument in the same name is estopped to deny that the payee or obligee is such a corporation." Section 407.

The bill of particulars so clearly states a cause of action that it is unnecessary to comment thereon. It is contended that some of the evidence admitted by the court was incompetent. The defendant has filed no cross-petition in error, and the question as to the competency of evidence admitted by the trial court is not relevant.

We have examined the other questions presented, and, upon a careful consideration of the same, perceive no good reason for the action of the court in sustaining the demurrer to the evidence. *Bequillard v. Bartlett*, 19 Kan. 382; *Merket v. Smith*, 33 Kan. 66; S. C. 5 Pac. Rep. 394; *Christie v. Barnes*, 33 Kan. 317; S. C. 6 Pac. Rep. 599.

The judgment of the court below will be reversed, and the cause remanded for a new trial, and with the direction that the court overrule the demurrer to the evidence.

(All the justices concurring.)

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(35 Kan. 146)

### MADDEN v. STATE.

Filed April 9, 1886.

#### 1. BAIL AND RECOGNIZANCE—ACTION—DENIAL OF EXECUTION.

In an action upon a forfeited recognizance the defendant, by a verified answer, averred that he signed the instrument when it was yet incomplete, and what is commonly known as a "blank recognizance;" the blank spaces left therein for the name of the county, the offense charged, the amount in which the prisoner was held, and the court before which he was required to appear, being left unfilled, and that he attached his name to it upon the condition that another person should join him in signing the recognizance, and, when so signed, the blanks should be filled out by the co-surety, and the instrument delivered, and that, unless it was so executed, he was not to become liable thereon. He also alleged that the recognizance was not signed or completed by the other party, and therefore that he was not liable thereon. *Held*, that this answer was in substance and effect a denial that the recognizance sued on had been executed by him, and a verified reply by the plaintiff denying the allegations of the answer was unnecessary.

2. SAME—LIABILITY OF SURETY.

A surety is liable on a forfeited recognizance, although it was signed by him when it was incomplete, where the blanks are afterwards filled up and the instrument completed and delivered in his presence and under his direction.

3. SAME—CONDITIONAL EXECUTION—EVIDENCE.

Where a surety claims and testifies that he signed the recognizance only upon the condition that another should join him as co-surety, proof that he was led to sign it by other considerations, such as indemnity furnished or property turned over to him by the prisoner, is not incompetent.

4. SAME—EXCUSING PRINCIPAL—PLEADING.

Proof cannot be offered by the surety that the default of the principal was excused, unless the acts relied on to excuse the default, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety.

Error from Ellis county.

*David Rathbone*, for plaintiff in error.

*Eugene L. Rooks* and *D. C. Nellis*, for defendant in error.

JOHNSTON, J. An information charging Orson Buno with the offense of grand larceny was filed in the district court of Ellis county, and he was required to enter into a recognizance in the sum of \$1,000 for his appearance at the following term of that court. He executed a recognizance with Edward F. Madden as surety, which was accepted, and he was released from custody. Failing to appear at the next term, the court adjudged the recognizance to be forfeited, and thereupon the county attorney brought this action against the surety, Edward F. Madden. The cause was tried with a jury, and verdict and judgment were given in favor of the state for the amount named in the recognizance.

Objections are made that the verdict and findings of the jury are not sustained by sufficient evidence, and also to the rulings of the court on the admission of testimony. It is first contended that certain allegations in Madden's answer should have been taken as admitted because the reply of the state to such answer was not properly verified. The petition contained the requisite allegations for a recovery upon a forfeited recognizance. In his answer, Madden admitted signing the recognizance, but alleged that it was then incomplete, and what is commonly known as a "blank recognizance." The blank spaces left therein for the name of the county, the offense charged, the amount in which he was held, and the court before which he was required to appear, were at that time unfilled; and that he signed it upon the condition that John Duncan or his wife should join him in the execution of the recognizance, and, when so executed, that Duncan should fill up the blanks in the recognizance, and that he was not to become liable thereon unless it was so signed and executed. He alleges that the recognizance was not signed by Duncan or his wife, nor were the blanks filled up by Duncan, and therefore that he never executed or delivered the bond upon which he was sued. In reply, the county attorney filed a general denial, signed by him-

self, and verified by Charles Miller, who swears that he has read the reply, and that the allegations thereof are true. It is claimed that this is not in conformity with the requirement of the Code, as it is not stated therein that the affiant Miller had knowledge of the facts sworn to by him; nor does it state that he is the agent or attorney of the plaintiff, nor any other fact conferring authority upon him to verify the reply. It is unnecessary to consider or determine whether the verification as made was sufficient, for the reason that a verified reply was wholly unnecessary. The new matter alleged in the defendant's answer did not fall within the provisions of section 108 of the Code. It is in substance and effect a denial that the bond sued on had been executed by him, and the plaintiff was not seeking a recovery upon any other. The defendant did not ask for any affirmative relief upon the instrument which he claims to have signed, and his averments respecting it only put in issue the execution of the recognizance upon which the action was brought.

Upon the sufficiency of the testimony there can be little question. It is true that Madden testified that he was not to become liable on the recognizance unless the blanks therein were filled out by John Duncan, and the recognizance signed by either Duncan or his wife. But on the other side there is the evidence given by the sheriff, strongly corroborated by the testimony of other witnesses, that no such conditions were imposed or mentioned. They state that the recognizance was signed, but not completed, at the court-house, in the presence of the sheriff and prisoner, from which place they soon afterwards went to the store of a Mr. Gates, who transferred to Madden a considerable sum of money belonging to the prisoner to indemnify him on the liability which he assumed in signing the recognizance; and that, after he had been so indemnified, he directed the sheriff to fill up the blanks and complete the execution of the recognizance. The justification was then written thereon, and signed by Madden, and when the recognizance was thus completed the sheriff accepted it and released the prisoner. This testimony was sufficient to warrant the jury in finding that the recognizance was executed by the surety prior to its delivery to the sheriff and the release of the prisoner, and sufficient to authorize a recovery thereon.

Objection is next made to the testimony that indemnity was given by the prisoner to the defendant for becoming his surety. Ordinarily, testimony that indemnity was given to the surety is immaterial in an action against him upon a forfeited recognizance. In this case, however, it was not improper. In his testimony Madden stated that he signed the recognizance only upon the condition that Duncan or his wife should join him as a co-surety. The testimony objected to tended to contradict this statement, and to show that no such conditions were mentioned; but, rather, that the inducement which led to the signing of the recognizance was the transfer and delivery by the prisoner to him of 41 head of cattle, county scrip to the value of \$175,

and \$500 in cash. For this purpose we think the testimony was competent.

It is finally urged that the court erred in not allowing an answer to the following question: "Now, what, if you know, kept Buno away from here?" It is said that the answer might have disclosed the fact that he had a sufficient legal excuse for his absence; but, as the issues were made up, the testimony was not competent. If the performance of the condition of the recognizance was rendered impossible by the act of God, such as sickness or death, or by the act of the state, it would have afforded a complete defense. Before this defense can be availed of, however, it must be pleaded. The answer alleged no such defense, nor was there any application to set it up by an amendment. In the absence of any allegation that would excuse the default, the proof offered was not admissible.

We see no error in the record, and will therefore affirm the judgment.

(All the justices concurring.)

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(35 Kan. 171)

ROLL and others, Partners, etc., v. MURRAY.

Filed April 9, 1886.

**JUSTICE OF THE PEACE—APPEAL—ATTACHMENT—ORDER DISCHARGING.**

In an action before a justice of the peace an attachment was discharged, and afterwards a judgment was rendered in favor of the plaintiff and against the defendant upon the merits, and afterwards the plaintiff filed an appeal-bond attempting to take an appeal both from the judgment of the justice upon the merits and from the order of the justice discharging the attachment, and the appeal-bond was sufficient for both purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. In the district court that portion of the appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace was dismissed. *Held* not error; that an order of a justice of the peace discharging an attachment is not appealable.

Error from Jefferson county.

*Jackson & Royse*, for plaintiffs in error.

*Keeler & Gephart and Mills & Wells*, for defendant in error.

VALENTINE, J. This was an action brought by Henry E. Roll, Norton Thayer, Thomas R. Williams, and J. B. Welsh, partners as Roll, Thayer, Williams & Co., before a justice of the peace of Jefferson county, to recover \$265.89 from J. H. Murray. At the time of the commencement of the action an order of attachment was obtained, which was afterwards levied upon certain property of the defendant. Afterwards, and upon the motion of the defendant, the attachment was dissolved. The case then came on for hearing upon its merits, and judgment was rendered in favor of the plaintiffs and against the defendant for \$126.55. Afterwards, and within proper time, the plaintiffs filed an appeal-bond, attempting to take an ap-

peal both from the judgment of the justice upon the merits and from the order of the justice discharging the attachment, and the appeal-bond was sufficient for both these purposes, if an appeal from an order of a justice of the peace discharging an attachment is allowable under the statutes. The case was then removed to the district court, and afterwards the defendant moved to dismiss that portion of the appeal which had for its object the review of the order of the justice of the peace dissolving the attachment, which motion was sustained by the district court. The case was then tried upon its merits by the court, without a jury, and judgment was rendered in favor of the plaintiffs and against the defendant, for \$262.09 and costs; and the plaintiffs, as plaintiffs in error, now bring the case to this court for review.

The only question presented by the plaintiffs in error to this court is whether the district court erred or not in dismissing that portion of the plaintiffs' appeal which had for its object the giving to the district court power to review and retry the attachment proceedings instituted before the justice of the peace. The statutes with reference to appeals, so far as it is necessary to quote them, read as follows:

"Sec. 120. In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered.

"Sec. 121. The party appealing shall, within ten days from rendition of the judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned," etc. Justices' Code, §§ 120, 121.

It will be seen that an appeal can be taken only from a "final judgment," and the appeal can be taken only after the "judgment" has been rendered, and only within ten days after the "judgment" has been rendered, and the amount of the appeal-bond must not in any case be "less than double the amount of the judgment and costs;" and when the case is taken to the district court on appeal, it "shall be tried *de novo* in the district court upon the original papers on which the case was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed." Justices' Code, § 122. There is no provision in the statutes for taking an appeal from the order of a justice of the peace in any provisional remedy, or in any ancillary proceeding, and no provision anywhere for retrying in the district court, upon an appeal from a justice of the peace, any question that pertains only to some provisional remedy or to some ancillary proceeding. The appeal is from a final judgment only, and from a judgment on the merits only, and the trial afterwards to be had on the appeal is only upon the merits. It has already been decided by this court that an ordinary appeal-bond, given by the plaintiff after a judgment has been rendered by a justice of the peace, will not carry to the district court

attachment proceedings instituted in the justice's court where the justice has discharged the attachment, (*Gates v. Sanders*, 13 Kan. 411;) nor garnishment proceedings in like cases, (*Brown v. Tuppeny*, 24 Kan. 29;) nor attachment proceedings in like cases where the appeal is attempted to be taken before any judgment is rendered upon the merits of the case, the dissolution of the attachment not being considered as a "final judgment," (*Butcher v. Taylor*, 18 Kan. 558;) and an appeal by the defendant from the final judgment of a justice of the peace will not carry attachment proceedings in the case of the district court, but will discharge the attachment, (*St. Joseph & D. C. R. Co. v. Casey*, 14 Kan. 504.)

Counsel for plaintiffs in error do not ask us to overrule any of the foregoing cases; hence we suppose they admit that an ordinary appeal-bond will not carry proceedings in attachment from a justice of the peace to the district court, nor will an appeal-bond, given expressly for such a purpose, do so where no final judgment has yet been rendered by the justice of the peace upon the merits of the case. But their claim is that an appeal-bond, executed after the attachment has been dissolved, and after the final judgment has been rendered upon the merits of the case, and within 10 days after the rendition of such final judgment, and executed for the express purpose of appealing from both the order discharging the attachment and the final judgment, will carry both the case, upon its merits, and the attachment proceedings, to the district court, where both can again be heard and determined. But suppose the attachment was dissolved more than 10 days or more than 50 days before the final judgment was rendered, then would it be claimed that it could be taken to the district court on an appeal, along with the case on its merits, when it could not be taken separately or by an ordinary appeal-bond? In our opinion, attachment proceedings cannot be taken to the district court at all on appeal, and it therefore follows that the order and judgment of the district court are correct, and the same will be affirmed.

(All the justices concurring.)

## SUPREME COURT OF CALIFORNIA.

(69 Cal. 188)

## THRIFT v. DELANEY. (No. 8,843.)

Filed March 30, 1886.

## 1. ACTION—RECOVERY OF REAL PROPERTY—SECOND ACTION INVOLVING SAME ISSUES—BAR OF JUDGMENT.

A judgment rendered in an action to recover real property, under the California system of pleading, is, as to all the matters put in issue and passed on in the action, conclusive between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters, occurring after its rendition, which give the defeated party a title or right of possession.

## 2. SAME—PRE-EMPTOR AFTER ENTRY FOR HOMESTEAD—ACTION BEFORE PRE-EMPTION—ESTOPPEL.

When a settler, without complying with the necessary conditions precedent to his right of obtaining a homestead patent, surrenders his claim in so far, and elects to, and by permission does, pay for the land as a pre-emptor, the patent that follows the new and original entry gives him a new title, and he cannot be barred or estopped from asserting such new title by any judgment in ejectment rendered before he obtained it.

Department 2. Appeal from superior court, Sonoma county.

*Rutledge & McConnell* and *A. W. Thompson*, for appellant.

*George Pearce*, for respondent.

BELCHER, C. C. On the twentieth day of January, 1879, the land in controversy was public land of the United States, and open to pre-emption or homestead entry. On that day the plaintiff, Sabin D. Thrift, made a homestead entry upon it by filing with the register and receiver of the proper United States land-office the requisite application and affidavit, and paying them the fee and commission required by law in such cases. On the fifteenth day of April, 1879, the defendant in this action commenced an action against Thrift to recover from him the possession of the land covered by his homestead entry. In the complaint it was alleged that the plaintiff was the owner and seized in fee of the premises, and that the defendant (plaintiff here) had entered and ousted him therefrom. The defendant appeared, and for answer to the complaint denied that the plaintiff was the owner or seized in fee of the premises, or entitled to the possession thereof. The case was brought to trial on the second day of June following. Upon the trial the plaintiff offered no evidence of a paper title, but relied solely on evidence of prior actual possession and inclosure of the land. The defendant contested his right to recover on that ground, but did not offer the receipt given him by the register and receiver, or any evidence of his homestead entry. The court found and adjudged that the plaintiff in the action was the owner of the premises sued for, and entitled to the possession thereof. On this judgment a writ of restitution was issued on the twenty-third

day of the same month, and under it the defendant was removed from the possession, and the plaintiff was placed in the possession, of the land. The judgment so rendered has never been reversed, modified, or set aside, but remains in full force and effect. Afterwards, on the fifth day of November, 1881, Thrift elected to commute his homestead entry to a cash entry, and to that end he surrendered his homestead entry receipt, paid for the land at the rate of a dollar and a quarter per acre, and received from the receiver of the land-office a receipt showing full cash payment. Upon this cash entry the United States issued to him a patent for the land on the fifteenth day of March, 1882. This action was commenced in November, 1882, to recover back the possession of the land. The defendant answered to the complaint, and, among other things, pleaded in bar of the action his former judgment.

The above is the substance of the facts found by the court, and upon the findings judgment was rendered in favor of the plaintiff, Thrift. The appeal is from the judgment and an order denying a new trial.

The principal question presented for decision relates to the plea in bar. It is not pretended that the appellant has any title or right to the land sued for, unless he can claim it under and by reason of his former judgment in ejectment. It is, however, insisted by him that when the former judgment was rendered the respondent had perfected his homestead entry, and was in such relation to the source of title that he might have defended successfully against the action, and, having failed or neglected to do so, the judgment is conclusive upon all rights he then had, or has since acquired, to the property involved in it.

There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar, in another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession. *Caperton v. Schmidt*, 26 Cal. 479; *Mahoney v. Van Winkle*, 33 Cal. 448.

Thus, it has been held, when judgment for the possession of a quarter section of land was rendered against one, after he had proved up and paid for the land under the pre-emption laws of the United States, and subsequent to the rendition of the judgment had received a patent for it, that the judgment was conclusive, and barred his rights in any subsequent action. *Byers v. Neal*, 43 Cal. 210. This ruling was made upon the ground that the pre-emptor, when he

proved up and paid for his land, acquired a title to it which he could sell or mortgage, or which could be sold out on process against him, and the patent afterwards received was not a new title, but merely a formal assurance of an estate which he had already acquired. It has also been held, where a pre-emptor had only settled upon and filed his declaration of intention to pre-empt a piece of public land, and then, in an action commenced against him for its possession, had been defeated and put out of it, but afterwards had gone upon another portion of the land, and again filed his declaration of intention to pre-empt the whole tract, and had then proved up and paid for the land, and obtained a patent for it, that the former judgment was not a bar or estoppel in any new action. *Montgomery v. Whiting*, 40 Cal. 294. And this ruling was made upon the ground that until the pre-emptor proved up and paid for the land he had no title to it, either inchoate or otherwise, and the judgment was not a bar to any title acquired by him after its rendition.

In this case it appears that when the judgment in *Delaney v. Thrift* was rendered Thrift had merely filed the necessary papers to enable him to take the land as a homestead; but this gave him no title to it. As said by the supreme court of the United States, quoting from an opinion of Atty. Gen. Speed:

"It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. \* \* \* The land continues subject to the absolute disposing power of congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money." *Frisbie v. Whitney*, 9 Wall. 195.

Under the homestead laws of the United States every person who is the head of a family, or who has arrived at the age of 21 years, and is a citizen of the United States, or has filed his declaration of intention to become such, may make a homestead entry upon not exceeding one quarter section of unappropriated public land. To do this, he must file in the proper land-office an application for the land, and an affidavit showing his right to make the entry, and "that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person." Upon this entry no certificate or patent for the land can be issued to him until the expiration of five years from the date of the entry, and then only upon satisfactory proof that he has resided upon or cultivated the same for the term of five years immediately succeeding the time of filing his affidavit. If during the five years he changes his residence or abandons the land for more than six months at any time, then, and in that event, the land reverts to the government. He may, however, if he elects to do so, pay the minimum price for the land at any time before the expiration of the five years, and then obtain a patent therefor from the government, on

making proof of settlement and cultivation as provided by law granting pre-emption rights. Rev. St. U. S. § 2289 *et seq.*

It must be apparent from this statement of the law that the government offers to give to the qualified claimant a homestead upon condition that he reside upon or cultivate the land for five years, just as it offers to give to the qualified pre-emptor a right to purchase, upon certain conditions, at the minimum price. But no estate vests in the pre-emptor until he has performed the conditions, and has proved up and paid for the land. *Hutton v. Frisbie*, 37 Cal. 475; *Low v. Hutchings*, 41 Cal. 634; *Frisbie v. Whitney*, 9 Wall. 187. The same rule, it seems to us, must apply to the homestead claimant, and no estate in the land will vest in him until he has complied with the prescribed conditions. The bare entry of a homestead can no more confer a right to or estate in the land, or a right to its possession, as against the government, than can the filing by the pre-emptor of his declaration of intention to pre-empt. Here, without complying with the conditions which were precedent to his right to obtain a homestead patent, Thrift elected and was permitted to surrender his homestead claim, and to pay for the land as a pre-emptor. When he did this according to the instructions of the commissioner of the general land-office he made "a new and original entry," and was entitled to a "pre-emption certificate and receipt as in ordinary pre-emption cases." Zab. Land Laws U. S. 149. The patent which followed that new and original entry gave to him a new title, and it seems clear that he cannot be barred or estopped from asserting that title by any judgment in ejectment rendered before he obtained it.

We are cited by counsel for appellant to *Shinn v. Young*, 57 Cal. 525; but that case is not in conflict with what has been said. There the land had been listed to the state and sold to Young. Young commenced an action against Shinn to recover its possession, and rested his right to recover on his certificate of purchase. Shinn defended the action upon the ground that the premises were a part of his homestead claim, taken up under the act of congress. Judgment was rendered in favor of the plaintiff and affirmed in this court. 48 Cal. 26. When *Shinn v. Young* was before this court it was held that the judgment in the ejectment action between the parties determined the validity of the certificate of purchase issued to Young, and the invalidity of the subsequent application by Shinn, under the United States homestead law; that the validity of the state certificate of purchase necessarily involved the validity of the state selection, including the listing of the land over to the state; that all of these proceedings having been put in issue and determined in the action of ejectment, the judgment was conclusive and binding upon the parties; and that as it was thus determined as between the parties that the United States had transferred the land in question to the state, it had no title left to transfer to Shinn by patent or otherwise.

The other points made by the appellant do not require special notice.

We see no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C., and FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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(69 Cal. 199)

CHENEY and others v. O'BRIEN. (No. 8,655.)

Filed March 30, 1886.

1. RIGHT OF WAY—WAY OF NECESSITY—INTERVENING LAND—TITLE IN STRANGER—PROOF OF TITLE—PAROL EVIDENCE.

In order to establish a right to what is known as a "way of necessity," over defendant's land, it being required of plaintiff to prove that the land intervening between his land and the county road belonged to a stranger, such proof could be made by parol.

2. PLEADING—AMENDMENT—DISCRETION OF COURT.

Applications to amend pleadings are addressed to the sound discretion of the court, and unless it clearly appears that the rights of the party objecting have been prejudiced by the amendment, he will not be heard to complain.

Department 2. Appeal from superior court, Sonoma county.

*George Pearce*, for appellant.

*William D. Bliss*, for respondents.

BELCHER, C. C. After carefully going over all the evidence presented in the transcript, we are unable to see that it does not justify the findings of the court. Upon some points there is a slight conflict, but that was a matter for the court below to consider and determine. The way over the defendant's land which he was alleged to have obstructed was a "way of necessity," and, besides, had been used by the plaintiffs long enough to give them a right to it by prescription. The fact that when the ground was soft the plaintiffs had sometimes turned out at one point, and made as many as seven different tracks there, did not affect their rights to the way; nor was it material whether the road to which the way led was a county road, as testified to by one of the plaintiffs, or a mere by-road, as testified by defendant. It appeared, without contradiction, to be a road which the plaintiffs and others had used for a good many years, and that was all that was necessary for the purposes of the case.

In the progress of the trial four objections and exceptions to the admission of evidence were taken by the defendant, and the rulings are assigned as errors.

The first two relate to the road above referred to. A witness for plaintiffs, in giving his testimony, at one time called the road a "high-way," and at another time a "county road." The defendant objected

that the testimony was secondary and incompetent, and moved to strike out the answers. We do not think the plaintiffs were called upon to show that the road had been formally laid out or dedicated so as to make it a public highway. It was beyond the defendant's land, and no question was raised as to the right of the plaintiffs to pass over it. Whether it was correctly designated by the witness or not was therefore altogether immaterial.

The next two objections were to questions in reference to the ownership of the land lying east of the plaintiff's land, and between that and the county road. A witness for the plaintiffs testified that prior to 1861 a Mr. Wardlow owned the land referred to, and a Mr. Carriger was in possession of it as his agent, and again that Mr. Wardlow claimed to be the owner of it. Counsel for defendant objected to the evidence upon the ground that it was secondary and incompetent, and then moved the court that it be stricken out. To establish their right to what is known as a "way of necessity" over defendant's land, the plaintiffs were required to show, among other things, that they had no other access to the county road. To this end they were attempting to show that when they received their deed the land lying between this land and the county road was the land of a stranger. This could be shown by parol, and it was not necessary, in the first instance, to introduce record evidence of the stranger's title. Code Civil Proc. § 1963, subds. 11, 12.

After the trial had commenced the plaintiffs asked leave to amend their complaint by striking out certain words from it. The defendant objected, but the court overruled the objection and allowed the amendment to be made. The defendant reserved an exception to the ruling, and now assigns it as error. Applications to amend pleadings are addressed to the sound discretion of the court, and unless it clearly appears that the rights of the party objecting have been prejudiced by the amendment he will not be heard to complain of it. Here, after the amendment was made, it was agreed by the parties that the answer should stand as the answer to the amended complaint, and the defendant then, without objection, went on with the trial. No injury is pointed out, and we are unable to see how any could have resulted, from the amendment.

We find no error in the record prejudicial to the appellant, and the judgment and order should be affirmed.

We concur: SEARLS, C., and FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

## SUPREME COURT OF UTAH.

(4 Utah, 257)

BACON v. RAYBOULD, impleaded with another.

Filed April 10, 1886.

## 1. JUDGMENT—CONFESSION OF—LAW OF UTAH.

The Utah statute regarding confessions of judgment requires that a sworn statement shall be made and filed by the debtor who seeks to confess the judgment, and, if the judgment be for money, that it shall "state concisely the facts out of which it arose."

## 2. MORTGAGE—PARTY LIMITED TO ONE SUIT FOR A PARTICULAR DEBT.

A party having one suit, either pending or in judgment, for a debt secured by mortgage, cannot have another action for the recovery of the same debt.

On appeal from First district.

*H. Emerson*, for respondent.

*Sutherland & McBride* and *C. K. Gilchrist*, for appellant.

BOREMAN, J. On tenth March, 1884, A. K. Thornton gave his note and mortgage to James Chipman for \$500, and these were assigned to appellant. On twenty-sixth July, 1884, appellant entered suit in First district court against Thornton to recover the amount of said note, and also of another note, and an account stated,—all *bona fide* debts,—but nothing was said about the mortgage. On the same day (twenty-sixth July, 1884) appellant obtained a writ of attachment in the same case, and said Thornton on the same day gave Chipman a power of attorney to confess judgment in that case, and on the first August following the confession of judgment was entered for \$728. In a few days thereafter, viz., on fourth September, 1884, Thornton gave Chauncey Bacon (respondent) his note and mortgage for \$1,200, due at six months. This mortgage and the Chipman mortgage embraced some of the same property. On seventeenth March, 1885, Bacon began his action in the same court against Raybould and Thornton, to foreclose his mortgage, and that is the action we are now considering. Raybould and Thornton filed a joint answer, praying that the judgment by confession on first August, 1884, be declared valid, and a prior lien to that of respondent; and also that the mortgage to Chipman, and assigned to appellant, be declared a prior lien to that of respondent; and that upon the sale of the property the Raybould liens, amounting in all to \$767.75, be paid, less a small payment. At the time of the filing of said answer the appellant filed likewise a cross-complaint against respondent and Thornton, and setting up the same matters as were set up in the joint answer, and making a similar prayer, and also that the property be sold.

Upon a trial of the case, the lower court found, as a conclusion of law, that the judgment by confession was null and void, and that that action was pending and undetermined when Thornton gave the Bacon note and mortgage; also that appellant was not entitled to a

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foreclosure of his mortgage; but that Bacon was authorized and entitled to a foreclosure of his mortgage. The court gave judgment accordingly, and thereupon said Raybould appealed the case to this court.

The appellant maintains that the judgment by confession, made by Thornton in favor of appellant, is valid, and a prior lien to the mortgage sought to be foreclosed by respondent, (Bacon.) Thornton made what purported to be a confession of judgment. It was made through the medium of an attorney in fact. The power of attorney authorized the attorney in fact to confess judgment. He was not authorized to do more. The judgment was therefore one by confession, or it was nothing. Our statute regarding confessions of judgment (Comp. Laws, p. 500, §§ 357-359; Laws 1884, p. 331, §§ 1014-1017) must be strictly pursued. *Chapin v. Thompson*, 20 Cal. 681. That statute requires that a sworn statement shall be made and filed by the debtor who seeks to confess the judgment, and, if the judgment be for money, that it shall "state concisely the facts out of which it arose." In the present case there was no such statement, nor any attempt to make one. The authorities go to the extent of holding that where there is an incomplete or insufficient statement of such facts, the failure to make a complete statement will be only *prima facie* evidence of fraud as to creditors, and that it cannot be attacked collaterally. But no case has been called to our attention where a court has held that a confession of judgment is merely *prima facie* fraudulent as to creditors, and not liable to be attacked collaterally where there was a total absence of the statement of any facts whatever. We know of no instance in which such a case has reached an appellate court. The statement of such facts is a prerequisite to the confession of judgment,—it is not a confession of judgment without it. Every attempt at making such a statement being wanting, the pretended judgment by confession was null and void, and the case, after its entry, was still pending and undetermined.

The appellant further maintains that the mortgage of tenth March, 1884, made by Thornton to Chipman, and assigned to him, is a valid prior lien to that of the respondent. The appellant held a \$500 note of Thornton, secured by that mortgage. That note was one of the notes sued in the action wherein Thornton essayed to make a confession of judgment. The appellant laid aside his mortgage lien, and sued in that action simply on the note, and did not ask any foreclosure of his mortgage, but instead thereof he sought and obtained a writ of attachment. In order to get his writ of attachment, he filed, as required by law, an affidavit that his mortgage had become nugatory by the action of the mortgagor, Thornton, the defendant in that action. His electing to pursue his remedy by attachment was a waiver of his remedy upon his mortgage. *Ladd v. Ruggles*, 23 Cal. 232. The purpose and intent of this provision of our attachment

laws were to prevent a party from pursuing both remedies, and it would not allow him to have his writ of attachment unless he should file an affidavit that his mortgage had become nugatory by the act of the defendant. Comp. Laws, 432, (1348,) § 123. If therefore, the appellant should now be allowed to fall back upon his mortgage lien, it would, in effect, thwart the very object of the statutory provision referred to, and allow appellant to pursue both remedies, and that, too, at the same time.

In this territory there can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage or other lien on real estate. This is our statute. Comp. Laws, 474, (1471,) § 246; Laws 1884, p. 268, § 606. The allowance of appellant's cross-complaint would be a nullification of that statute. A party having one suit, either pending or in judgment, for a debt secured by mortgage, cannot have another action for the recovery of the same debt. His whole claim must be embraced in one suit. There is no reason why this could not have been done in regard to the debt of appellant. This is the rule in California under a similar statute. *Porter v. Muller*, 65 Cal. 512; S. C. 4 Pac. Rep. 531; *Ould v. Stoddard*, 54 Cal. 613; *Eastman v. Turman*, 24 Cal. 382.

Upon the whole case, therefore, we see no reason for reversing the judgment of the court below, and it is therefore affirmed.

LANE, C. J., and POWERS, J., concur.

## SUPREME COURT OF OREGON.

(13 Or. 317)

## WHITE v. COUNTY COM'RS OF MULTNOMAH CO.

Filed March 31, 1886.

## 1. ELECTIONS—REGISTRY LAWS VOID—OREGON CONSTITUTION, ART. 2, § 2.

Under the Oregon constitution, which prescribes the qualification of voters, and makes no provision for registration laws, any statute which requires previous registration as a prerequisite to the right to vote is *ipso facto* void.<sup>1</sup> THAYER, J., dissenting.

## 2. SAME—TAX-PAYER—ENJOINING PAYMENT OF REGISTRATION EXPENSES.

A citizen and tax-payer of a county may maintain a suit against county officers to restrain them from auditing and allowing bills against the county incurred in the execution of an unconstitutional registration law.

Appeal from Multnomah county.

T. A. McBride, W. D. Fenton, and John Burnett, for appellant.

Joseph Simon and John M. Gearin, for respondent.

WALDO, C. J. This suit is brought to determine the constitutionality of the late act providing for the registration of voters. The constitution of Oregon, (article 2, § 2,) provides:

"In all elections not otherwise provided for by this constitution, every white male citizen of the United States of the age of 21 years and upwards who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of 21 years and upwards who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law."

The counsel for the plaintiff pointed out in detail the extraordinary provisions of the law. The district attorney for the Fifth judicial district, as a sample of the workings of the law, explained how he would be deprived of his vote by the mere fact of necessary absence from Clackamas county during the period of registration in attending to his official duties in other counties in his district. We find it unnecessary, however, to enter into an examination of the details of the act, for it is met at the threshold by a fatal objection. As we construe the constitution, every law which requires previous registry as a prerequisite to the right to vote is *ipso facto* void. The legislature would have the power by implication, had it not been expressly conferred to prescribe the manner of regulating and conducting elections; but the right to vote itself has been placed beyond their interference or control. This fact seems to have been forgotten in framing the act. And how different, apparently, was the framers' conception of the important nature of the right from that of Lord Holt, nearly 200

<sup>1</sup> See note at end of case

years ago, a judge who was never accused of being recreant to the liberties of Englishmen: "That a right which a man has to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws, which are to him his liberty and property, is a most transcendent thing, and of a high nature." *Ashby v. White*, 2 Ld. Raym. 953. If the attention were not permitted to wander beyond the act itself, the thought would hardly occur that the legislature were dealing with a right vested in the citizen by the constitution,—a right of which "no department of the government, nor all of them combined," said the court in *State v. Adams*, 2 Stew. (Ala.) 239, "have the power to divest an individual, otherwise than is prescribed by the constitution." So, in *Brown v. Hummel*, 6 Pa. St. 86, COULTER, J., said: "The most important of all our franchises—the right of an elector and citizen—cannot, in a confined sense, be called property. It is not assets to pay debts, nor does it descend to the heir or administrator. But who does not feel its value, and who but would turn pale if he thought he could be deprived of it, without hearing or trial, by act of assembly?"

Important, however, as the question may be, we approach its consideration without solicitude other than an anxiety to understand and declare the law of the land. That inveterate argument, the gravity of declaring an act of the legislature unconstitutional, was urged as usual in such cases. If, however, a law be unconstitutional, the gravity of not declaring it to be so is also worthy of consideration. Our constitutions are "written securities of liberty," as Chief Justice RUFFIN has expressed it. That sound and able judge, Mr. Justice CAMPBELL, of Michigan, well said in *Sears v. Cottrell*, 5 Mich. 283, that "every unconstitutional law which is made to stand creates a permanent and deadly evil by overturning the only safeguards we have against public usurpation." The judiciary, as the guardians of the people's constitutional liberties, must, in duty, observe that vigilance against constitutional encroachment which is said to be the price of liberty. The rules of law are beyond the control of those who are merely to declare what the law is. In every case the gravity consists in ascertaining what the law is. A text of the famous Littleton has come down to us in the Year Books, (Y. B. 6th Ed. 4, 8, pl. 18:) *Le ley est tout un en griend et meind*,—"the law is all one, in great things and small."

The right to vote under the constitution is a vested constitutional right. "When I say a right is vested, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." CHASE, J., *Calder v. Bull*, 3 Dall. 394. If the right be vested by the constitution, it denotes a right that cannot, under the constitution, be taken away. *Rich v. Flanders*, 39 N. H. 385; *Eakin v. Raub*, 12 Serg. & R. 360. It would seem that every case, from *Capen v. Foster*, 12 Pick. 485, down, which has sustained against similar objections the constitutionality of a registry law which

requires previous registry as a prerequisite to the right to vote, has taken it for granted that such laws were mere rules of procedure. It was assumed in *Capen v. Foster* that the right to make investigations into the qualifications of voters necessarily implies the right to compel the voter to furnish previous proof of his qualifications; that such a law was but "a reasonable and convenient regulation of the mode of exercising the right of voting." It was placed on the same footing with a law which required the voter to offer his vote in writing. Now, voting *viva voce* or by ballot is a pure rule of procedure. So are laws regulating polling places, and the times for opening and closing the polls. He who takes a check to a bank to cash it must indorse it. He who pays money is entitled to a receipt. This is procedure. But if a contract be to pay money on a fixed day, a subsequent law requiring the payee to give 10 days' notice of the time and place of payment, or no obligation to pay shall arise, affects the substance of the contract, and is void. It is conceived that laws are of like nature which require previous registry in order to vote. Where the right is secured by the constitution, such laws, having merely a legislative sanction, are void.

The true view of this question seems to be that stated in *State v. Baker*, 38 Wis. 86,—that where registry is required as a prerequisite to the right to vote, such registry is a condition precedent to the right itself, and therefore a rule or substantive law. This principle was subsequently practically applied in *Dells v. Kennedy*, 49 Wis. 555, S. C. 6 N. W. Rep. 246, 381, in which a registry law of Wisconsin was held to be void. It results as follows: A "right" has been defined by Mr. Justice HOLMES to be the legal consequence which attaches to certain facts. The Common Law, 214. Every fact which forms one of the group of facts of which the right is the legal consequence appertains to the substance of the right. The right to vote under the constitution may be defined to be a vested right in *presenti*, to be exercised in *futuro*, on a fixed day. When that day arrives, and the right is to be exercised, every fact essential to the existence of the right is a substantive fact. Previous registry in order to vote is precisely such a fact. It is a condition precedent which must be performed, or when the day arrives no right will exist. Procedure *ex vi termini* appertains to the mode of enjoyment or enforcement of a right. No rule of procedure can operate anterior to the time when the right is to be enjoyed or enforced. It cannot have effect to determine a right before the right accrues. The distinction, therefore, sought to be drawn on this subject between what constitutes a qualification and what, in contradistinction, is called a mode of proof of qualification, is unsubstantial.

We may say of the attempted distinction, in the words of a chief justice of England centuries ago: "Therefore we must take off this veil and cover of words, which make a show of something and in truth are nothing." "Every definition of the qualification of voters,"

said Mr. Drake, the author of the Law of Attachment, arguing in *Blair v. Ridgely*, 41 Mo. 163, "is but a statement of the terms on which men may vote; and in every instance such definitions refer to what a party has done as well as to what he is. They say to the voter: 'If you have done certain things you can vote.'" He who does not register is not qualified to vote, and hence is not a "qualified elector,"—a phrase that is used five times in the constitution to signify those who are entitled to go to the polls on election day and legally vote. See *Byrne v. State*, 12 Wis. 524; *Sanford v. Prentice*, 28 Wis. 363. But under this act he who goes to the polls on election day, possessing every constitutional qualification, may find that the legislature has stepped in between him and the constitution. He finds his vote denied because he has not done something which the legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had effect to disqualify him is not itself a disqualification; or if he have performed the act, that his performance does not constitute a qualification. This will not square with the logic of facts. The distinction between what is substantive and what is modal, is confounded. He who has a right to something to-morrow can never be secure of his right before to-morrow comes. If this can result, then the constitution does not mean what it says.

*McCafferty v. Guyer*, 59 Pa. St. 111, very aptly says:

"Can the legislature, then, take away from an elector his right to vote while he possesses all the qualifications required by the constitution? This is the question now before us. When the citizen goes to the polls on election day with the constitution in his hand, and presents it as giving him a right to vote, can he be told: 'True, you have every qualification that instrument requires; it declares you entitled to the right of an elector; but an act of assembly forbids your vote, and therefore it cannot be received.' If so, the legislature is superior to the organic law of the state; and the legislature, instead of being controlled by it, may mould the constitution at their pleasure. Such is not the law."

And so must we say in this case.

Where a constitution provides, as does that of New York, "that laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage," the power to pass a registry law seems fully implied. See *U. S. v. Quinn*, 8 Blatchf. 59. The case of *State v. Butts*, 31 Kan. 554, S. C. 2 Pac. Rep. 618, was grounded on a like constitutional clause. The difference between those cases and the present is the difference between a case where a power has been conferred and a case where it has not. So, on the other hand, a question can never arise under a constitution like that of Texas, which has declared in unequivocal terms that "no law shall ever be enacted requiring a registration of the voters of this state." See *U. S. v. Slater*, 4 Woods, 358; S. C. 6 Fed. Rep. 824. The right of the plaintiff to maintain this suit is set at rest by the decision of this court in *Carman v. Woodruff*, 10 Or. 133. The opinion cites,

with many other cases, *Page v. Allen*, 58 Pa. St. 338, which presented this very case.

The decree must be reversed, and the court below directed to make the injunction perpetual.

LORD, J., concurred.

THAYER, J., (*dissenting*.) The appellant filed a complaint in the court below to restrain the respondents, as county judge and commissioners of said county, from auditing and allowing certain bills against their county incurred in the execution of the law known as the "Registry Law," claiming that said law was unconstitutional, and that, unless restrained, the respondent would audit and allow claims to the amount of several hundred dollars of such bills. The complaint alleged that the appellant was a citizen of, and a legal voter and tax-payer in, said county and state, and that the execution of said law as threatened by the respondents would prove of great injury to the public and to the appellant. The respondents filed a demurrer to the complaint, which was *pro forma* sustained by the court, and the appeal is taken from the decision thereon.

It is apparent that the suit was begun for the purpose of obtaining the opinion of this court as to the validity of said law. Counsel upon both sides seemed to be conscious at the hearing that the court might view the matter in that light, and were particular to insist that the court had full cognizance of the case; but it seems to me that if we attempt to consider its constitutionality under these proceedings our determination would be extrajudicial. This court ought not to pass upon so important a question unless the litigation is genuine, and the plaintiff in the suit shows, by his allegations, that he has a right to have it decided. He should allege facts showing that he was liable to suffer a special injury, and that he was entitled to invoke an equitable remedy to prevent it. The question of the legality of the act known as the "Registry Law" is of great importance to the people of the state, yet I cannot reconcile myself to the notion that we should undertake to determine it unless a proper case is presented for our consideration. I cannot perceive that the appellant has any standing to raise the question. He is one of the public, it is true, and a tax-payer, but the execution of the act referred to will not affect him any more than any other tax-payer. If he wants to test the legality of it, he can do so, probably, by neglecting to register in accordance with its provisions, and offering his vote on election day. Then, if the judges refuse to receive his vote, he can maintain an action against them for such refusal, provided the registration act is unconstitutional. Whether it is unconstitutional or not depends upon whether it is inconsistent with the privileges secured by the constitution to the citizens. The constitution of the state provides fully the qualifications for voters:

"In all elections not otherwise provided for by this constitution, every male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every male of foreign birth, of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law." Section 2, art. 2, Const.

And section 17, art. 2, of that instrument, provides where they shall vote, viz.:

"In the election precinct in the county in which they may reside, for county officers, and in any county in the state, for state officers, or in any county of a congressional district in which such elector may reside, for members of congress."

The legislature cannot add any other or different qualifications than these; but it is required to enact laws to support the privilege of free suffrage; prescribe the manner of regulating and conducting elections; and prohibit, under adequate penalties, all undue influence therein from power, bribery, tumult, and other improper conduct. Sec. 8, art. 2, Const. And counsel for the appellant make no question in this case but that the legislature has the right to adopt a registry law for the purpose of ascertaining the qualifications of persons claiming the right to vote, but they object to this act or acts (there are three or four of them, including amendments) for the following reasons: (1) The act impairs the right of suffrage. (2) The act is unreasonable exercise of the powers to regulate the elective franchise. (3) The act destroys the right of suffrage, and absolutely denies the right to an unknown number of legal voters. (4) The act provides for and requires political tests as qualifications for the officers who execute the law. (5) The act prohibits any elector from voting any ballot except one obtained from a committee of a political party, and punishes, in effect, the independent or non-partisan voter. (6) The act, in effect, prohibits the supervisory control over congressional elections provided for by sections 2005, 2011-2014, 2016-2019, 2021, *et seq.*, Rev. St. U. S., and in effect denies to citizens of the United States privileges and immunities conferred by these laws.

The attempt to adopt any law upon the subject seems to have been attended by a series of blunders. The main act, which was approved February 24, 1885, provided for holding a general election on the first Monday of June, 1885, and made it the duty of the judges and clerks of the election to meet at the usual place of voting in their precinct on the first Monday in March preceding each general election for the purpose of registering "voters" in said precinct. It was afterwards discovered that the general election could not be had until the first Monday in June of 1886. A special session of the legislature was convened to correct it, and for other purposes, and an amendment, approved November 24, 1885, was adopted to cure the error. Sub-

sequently the legislature adopted another amendment, approved November 25, 1885, in which it was provided that the judges and clerks of election should meet on the first Monday in April preceding each general election for the purpose of registering "votes," and amended the original act in other particulars. Thereafter, and on the thirtieth of November, 1885, the legislature adopted a sort of supplemental act entitled "An act for a uniform system of books and certificates, to be used in the registration of voters and elections, as laid down in an act entitled," etc., including the title of the original act, approved February 24, 1885, which contained rules and instructions for judges and clerks of election; but in providing therefor it was provided that on the first Monday in March preceding each general election the judges and clerks should meet for the registration of voters. This provision, however, related to the instruction that should be contained in a certain book called "The Precinct Register."

By a close inspection of the act, it will, I think, be discovered that the legislature did not intend to change the time for the meeting of the judges and clerks back to the first Monday of March, but it provided an instruction which would require them to meet at the latter time. It was evidently a mistake in that respect. The intention of the legislature, no doubt, was to have the instruction conform to the act as amended November 25, 1885. It is a misfortune that the effort to adopt so commendable a law should have been attended with so many mishaps, as they tend very much to prejudice it with the community, and deprive it of that support so essential to the maintenance of legislative enactments.

The main grounds upon which the act is claimed to be unconstitutional are that the length of time allowed voters in which to register is unreasonably short, and that there is no provision for allowing voters to vote for state officers and members of congress outside of the precinct in which they reside. The amended act of November 25, 1885, provides that the judges of election shall organize by electing one of their number as chairman; that they shall meet at 9 o'clock in the forenoon, and continue until 5 o'clock in the afternoon; that they may adjourn one hour at noon; that they shall continue said session for three days. Section 13 of the original act provides that in case of sickness or absence from the precinct, etc., of any qualified elector during the time the judges are sitting to register voters, such elector may apply to the chairman of the board of judges; and on making satisfactory proof that the said applicant is a qualified voter of said precinct, and that said applicant was sick or necessarily absent from said precinct during the time said board was sitting to register voters, the said chairman may register the name of the applicant on the register in his possession, and issue to him the required certificate; but such application, by section 14 of the act as amended, cannot be made after the twenty-fifth day of April preceding the general election.

It is contended that the regulation is not reasonable because the right to register is not continued until the day of the election. I suppose the legislature deemed the three-days session of the board as sufficiently long to enable the voters in the precinct to register, and that the provision for those who were sick, or absent therefrom, as ample time to enable them to do so, and, conceding that the legislature has the right to require such registration prior to the time of the election, it has the right to judge as to what would be a reasonable time for the purpose. Whether it has judged correctly or not will be ascertained by the practical working of the law. A person would naturally suppose that the voters of a precinct could all register in three days as well as all vote in one. They certainly would do so if they attached that importance to the elective franchise that good citizens should. This law will doubtless subject many citizens to considerable inconvenience, but they had much better submit to that than have their voice stifled by the admission to the privilege of a horde of lawless mercenaries and repeaters. The citizen's duty is not fully discharged when he has deposited his ballot; he should attend to it that no spurious or illegal vote counteracting the effect of his own be cast. Elections are but a travesty where every vagabond may vote without restraint. It is no privilege to vote when an irresponsible wretch can be imported to vote, or hired to repeat his vote. Elections may as well be turned over to the hoodlum element of the community to manage and control, if citizens are unwilling and refuse to submit to the inconvenience a registry law imposes.

The reasoning of the court in *Daggett v. Hudson*, 3 N. E. Rep. 538, to my mind, is purile. It is to the effect that the legislature may adopt a registry act, but it must not incommode the legal voter. The steam-boat man, the student, and the commercial traveler must not be required to attend and have his name registered as a voter prior to the time of exercising the right to vote for the reason, in effect, that the steam-boat might lose a trip, the student a lesson, and the commercial traveler the opportunity of making a sale of merchandise to a customer, the consequences of which, according to such logic, would outweigh the necessity of preserving the purity of the ballot box and the efficiency of government. If any one is able to discover a hardship in requiring a citizen to attend once in two years at the polling place in the precinct where he resides to be registered as a voter, and that a regulation is unreasonable which requires him to do that as a prerequisite to his voting at an election, in order to prevent fraudulent voting, and elections from becoming a farce, is exceedingly critical. That it is an inconvenience no one will deny, but who would not endure that in preference to having elections, at which persons are selected to administer the affairs of the government, made a mockery and be the subject of ridicule. The claim that the right to register should be continued down to the day of voting in order to make the regulation reasonable would destroy the

whole efficiency of it. There is an object and purpose in such a law. It is intended to prevent illegal voting. This cannot be accomplished unless the names of voters are enrolled a length of time before the election, so that they can be inspected, and it be ascertained whether they have the requisite qualifications or not. If it is left until the day of the election, when they can rush in "pell-mell" and roll under their tongue "as a sweet morsel" a false oath regarding their qualifications as an elector, it would be an idle, useless performance, and the community would be as well off without it.

There are some provisions in the act which require construction. The form of oath, when a voter is challenged, should be adapted to the circumstances under which the vote is offered. The legislature did not, evidently, intend that the voter should swear that he was a resident of the county and precinct where he offered his vote when he only proposes to vote for state officers or congressman, and the requirement that he has been for the last 90 days an actual resident of the county cannot be enforced at all. The constitution makes no provision that the voter should have been a resident in the county for the 90 days. It requires that he shall vote in the election precinct in the county in which he resides for county officers. This 90-day provision, however, was in the old law, and the legislature has continued it in this. It is an extra requirement that cannot be enforced, but does not affect the validity of the new law any more than it did the old one.

Counsel for the appellant seemed to imagine that there were many features in the law that would operate oppressively. But I fail to discover how they are liable to, with a fair and intelligent administration of its provisions. It has just come from the hands of the legislature,—has not been tried, nor should thus early be condemned. If the people will take hold of it as patriotic citizens ought to of a measure that so vitally concerns their welfare, it will, I believe, be found to be a great blessing. The system of fraudulent voting that has been inaugurated in some parts of this state, and affects every part of it, is as certain to retard and ruin its prosperity as vice is certain to result in misery. It is the violation of the moral law, and that it will be attended with fearful consequences is as sure as the violation of the organic law is to produce disease and death.

The appellant has attempted to impose upon the court a very delicate duty. He asks the court to determine that the act of a co-ordinate branch of the government is a nullity. This ought never to be done unless the legislature has clearly overstepped its authority. It would certainly present an anomalous condition of affairs if the relief sought herein were granted. Representatives chosen by the people, constituting the legislative branch of the government, meet at the capitol of the state in February, 1885, and enact a form of law to ascertain the qualification of persons claiming to be electors, and requiring the names of those found to possess the requisite qualifica-

tion to be registered, and a certificate issued to them that they are qualified to vote. The act is duly approved by the governor of the state, but it is subsequently observed that in consequence of some clerical error, perhaps, the act will be ineffectual. The legislature is again convened, and proceeds by amendment to perfect it. The amendments are also approved by the governor, and included among the laws of the state. But before the time has arrived for the execution of any of its material provisions, and before the ink with which it was written has fairly dried, parties rush into court to have it nullified. The courts have important functions to perform, but they are not autocratic tribunals. They have no authority to say to the people that they shall not have the benefit of a law their representatives have made for them, presumably in accordance with their wishes. Courts are instituted to administer the law, not to unmake it. They may question its validity when it infringes upon the right of a person which they are called upon in a suitable proceeding to protect. The legality of any enactment may be drawn in question incidentally, but it would be highly improper for them to attempt to exercise a veto power upon legislative proceedings. That would be as unconstitutional as the legislative enactment could possibly be.

In *Patterson v. Barlow*, 60 Pa. St. 54, a similar question was brought before that court by a suit similar to the one in this case. Judge AGNEW, in delivering the opinion of the court, said that the defendants denied the standing of the plaintiffs as proper parties, and the jurisdiction of the court over the subject; but that in view of the danger to the peace and quiet of the people if the constitutionality of the law should be left in uncertainty, the court would pass by the question of standing and jurisdiction in order to reach the all-important one upon the validity of the law. The learned judge suggested, however, that in passing them by the court did not mean it to be inferred that it had not grave doubts of the right of the plaintiffs to represent the public, and of its own jurisdiction to enjoin against one of the political systems of the state in its entire scope because of the invalidity of some of its provisions; that the court doubted the right of the plaintiffs to call for an injunction beyond that portion of the law which they, as private citizens, could show to be injurious to their own rights; and that it was more than doubtful how far, as private citizens, they could impugn the law in its public aspects, and ask the court to restrain its execution on public grounds; that the system there referred to was the only one to regulate elections intended by the legislature to be left in force, all laws supplied by it, and all inconsistent with it, being expressly repealed. It was further suggested that if the court, as a court of equity, could lay its hands on the whole system because of the illegality of some of its parts, it could, on the eve of any election, arrest the entire political machinery of the commonwealth which is set in motion by a general election.

In view of the said suggestions, the opinion of the court regarding

the merits of the case must have been *ex gratia*, and such, necessarily, will be the character of any opinion as to the validity of the act in question we may express in this case. There is no party before the court who has the right to require us to determine as to its validity. What relief could a court of equity grant the appellant in his suit? What "bills" would it interdict the county court from auditing? What restraint could it place upon that tribunal? What functions would it decree should not be exercised by the county judge and commissioners sitting to transact county business? Should it say to them that a certain enactment of the legislature assembly was void, and inhibit them from administering its provisions? A common-law writ of prohibition could not have been sued out for any such purpose. It could only be resorted to against judicial encroachments. It lay to prevent inferior courts from exceeding their jurisdiction. An injunction may be granted to restrain the unlawful acts of public officers when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits. Upon those grounds the imposition or enforcement of illegal taxes may be enjoined at the suit of a tax-payer. There, however, the party's estate is directly affected. The immediate object of the act is to impose a charge upon it. School laws, highway laws, laws incorporating towns, and police laws, generally have the effect to create a public expense; but who ever supposed that a party, because he was liable to be affected thereby, could have the officers charged with the execution of such laws enjoined from enforcing their provisions upon the grounds of their supposed invalidity? If such a rule is to obtain, it ought to be extended far enough to include the legislature itself.

I am of the opinion that the registry act in question is not unconstitutional; that the legislature has power to provide the mode it has in order to ascertain who are qualified electors, under the constitution; and that the provisions of the act are not so unreasonable as necessarily to deprive voters from the exercise of the right of suffrage; but I do not consider my opinion in the case, in the condition it is before the court, as any more authoritative than if it were delivered on the street informally. I do not believe that a citizen at large can require the courts to inquire into the constitutionality of a legislative enactment until he is hurt by it, or there is imminent danger of his receiving special injury from its threatened enforcement.

The complaint herein should be dismissed.

#### NOTE.

A registration law which prohibits a duly-qualified elector from voting at an election, unless he has been registered before the election, or prohibits one who has qualified after the last day for completing the registry, and before the election, from voting at such election, is unconstitutional and void. *Dells v. Kennedy*, (Wis.) 6 N. W. Rep. 246.

A registration law directing the books to be closed 10 days before the election, and making no provision for the registration or voting of persons becoming qualified to vote after the closing of the books, and before election, is not void so as to render the

election void; especially if it do not appear that the result would have been different if a provision had been made for such voters. *Weil v. Calhoun*, 25 Fed. Rep. 865.

It was held by the supreme court of Ohio in the recent case of *Daggett v. Hudson*, 3 N. E. Rep. 538, "that the general assembly, under the general grant of legislative power secured to it by the constitution, has power to provide by statute for the registration of voters, and to enact that all electors must register before being permitted to vote. Such an act, however, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert, or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right;" and that a registration act "requiring registration in all cases as a condition to the right of suffrage; \* \* \* and allowing the voters only seven specified days within the year in which to register and correct the registration; which contains no provision for registration after the seven days, (although five days thereafter intervene before election day;) and no regulation whereby those constitutionally qualified may, upon proof of their qualifications, and a reasonable excuse for not registering in time, be allowed to vote; and where no other means are provided whereby persons necessarily absent at the time fixed for registration may have their names registered,—is unreasonable, and has a direct tendency to impair the right of suffrage, and may disfranchise, without their fault, a large body of voters necessarily absent from the place of registry during the allotted time for registration, and is therefore unconstitutional and void."

(13 Or. 337)

### RICE v. RICE.

Filed April 5, 1886.

#### PLEADING—DEMURRER—EFFECT.

Under Code, § 491, declaring that defendant may admit the charge, and show in bar that the suit was not commenced within a year, a demurrer is not an absolute admission of the facts alleged.

*Raleigh Stott*, for appellant.

*W. F. Mulkey*, for respondent.

LORD, J. This is a suit for a divorce. The defendant demurred to the complaint upon the ground that the suit had not been commenced within the time prescribed by the statute. The court below overruled the demurrer, and the defendant refusing to further plead, upon motion, a default was taken for want of answer, and the suit referred to take and report the testimony. Upon the report of the referee, the cause was heard by the court, and the decree rendered, from which this appeal is taken.

The error complained of is the overruling of the demurrer. The Code provides that the defendant may demur to the complaint when it appears upon the face thereof \* \* \* that the action or suit has not been commenced within the time limited by this Code. Code, § 66; sub. 7; Id. § 385. But when the suit is for a divorce, it is provided that "when the suit is for any of the causes specified in subdivisions, 3, 4, 5, and 6 of section 491 the defendant may admit the charge, and show in bar at the suit \* \* \* that the suit has not been commenced within one year after the right of suit accrued." Code, § 494. The contention of the defendant is that his demurrer is well taken, and in compliance with the requirements of the statute; that it "admits the charge, and directs attention to the complaint, upon the face of which it appears that the suit was not commenced within one year after the right of suit accrued. It is admitted, ordinarily, in actions at law or suits in equity, that, when it appears from the complaint that the action or suit has not been brought within the time lim-

ited by the statute of limitations, a demurrer is the appropriate pleading to take advantage of the statute, and bar the action or suit; but in suits for divorce the plaintiff contends that the statute, in its nature, is special and peculiar, and in order for the defendant to avail himself of it he must bring himself within its terms and provisions; that the language of the statute that "he may admit the charge, and show in bar of the suit," etc., means that he must admit the charge as a matter of fact, or of evidence, and not as a technical theory of law, before he can take advantage of it.

The real inquiry, then, is whether a demurrer or answer is the proper pleading to take advantage of the statute. The language of the statute is that "the defendant may admit the charge, and show in bar of the suit," etc.,—that is, admit the truth of the facts charged as facts, and show other facts in bar,—confess and avoid,—and this is precisely what the defendant claims is the effect of his demurrer. To sustain this view, a demurrer must be an absolute admission of the facts demurred to. What does a demurrer admit? In his Treatise on Pleadings Mr. Gould says: "A demurrer to the declaration is not classed among pleas to the action, not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not therefore regarded as strictly a plea of any class, but rather an excuse for not pleading." Section 43, c. 2. "To demur is to rest or pause." And, again: "A demurrer merely advances a legal proposition,—it forms an issue in law. Admitting the facts so far as well pleaded, for the purpose of taking the opinion of the court preliminarily, its language is: 'Allowing all that is alleged to be true, there is not anything that calls for an answer, plea, or defense.'" Id. c. 9.

In *Pease v. Phelps*, 10 Conn. 62, the court say: "A demurrer presents only an issue in law to the court for consideration; the jury have no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded for the sole purpose of determining their legal sufficiency, yet, as a rule of evidence, it was never supposed that a demurrer admitted anything." In *Tomkins v. Ashby*, Moody & M. 32, it was held that a demurrer or plea to a bill in equity does not admit the facts charged in it, so as to be evidence against a defendant, if those facts arise in a future action between the same parties; ABBOTT, C. J., remarking that it was nothing more than saying "that, *supposing* the facts charged to be true, the defendant is not bound to answer."

Mr. Bliss says:

"In denying the legal conclusions from the facts pleaded, the admission of their truth as facts is necessarily implied, and the old rule was stated, substantially, that the truth of a pleading not obnoxious to a general demurrer was admitted; or, more briefly, that a demurrer admitted the facts well pleaded. Thus, if the demurrer is overruled, and the pleading demurred to thus held to be good, unless the demurrer is withdrawn judgment will be necessarily rendered against the party demurring, because he has admitted the truth of

the pleading; that is, has confessed the facts held to constitute a cause of action or defense. Such is the theory, and yet it is improperly called an affirmative admission. Nothing is in fact admitted. The demurrant simply denies the proposition of law involved in the pleading demurred to, and the parties go to trial upon an issue of law, and if this issue is found against him, judgment goes against him. The facts are admitted only because they are not denied." Bliss, Code Pl. § 418.

A demurrer, then, is not an absolute admission. Its only office is to raise issues of law upon the facts stated in the pleadings demurred to. Nor, as CROCKETT, J., said, is "the effect of a demurrer to set out the facts. On the contrary, all the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of the facts to constitute a cause of action or defense." *Brennan v. Ford*, 46 Cal. 12. When allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be commented upon by the court as if they were *de facto* true. *Day v. Brownrigg*, 10 Ch. Div. 294. It is a pleading by which one of the parties in effect says that the facts stated by the adverse party in his pleading, even assuming them to be true, do not sustain the contention based on them, or, in a word, do not show a good cause of action or defense. This is not admitting the facts charged as *de facto* true. It is simply admitting the facts for the sole purpose of presenting their sufficiency to the court for determination; or equivalent to saying: "If the facts be so, the defendant is not bound to answer." Now, this is not the kind of pleading, or the admission required by the pleading, which the statute contemplates. It requires the admission of the charge as a fact, not assumed to be true for the purpose of ascertaining its legal sufficiency, but confessed to be true as an actual fact, and a showing of other facts in avoidance or bar of the suit. This cannot be done by demurrer, for its office is not to set out facts. The statute evidently contemplates that the charge admitted, and the other facts shown in bar of the suit, by the defendant, shall be embraced in one pleading to accomplish this result. It says: "The defendant may admit the charge, and show in bar of the suit that the act complained of was committed by the procurement of the plaintiff, or that it has been expressly forgiven, or that the suit has not been commenced within one year after the right of suit accrued." A demurrer cannot perform the office contemplated by this provision. If a demurrer were such a solemn admission upon record as claimed by counsel, then it might be used against the defendant upon a subsequent trial of an issue of fact, and it would become, like other admissions, a part of the law of evidence; yet, as evidence, we all know that it admits nothing whatever.

There was no error. The decree of the court below is affirmed, with costs and disbursements.

v.10p.no.7—32

(13 Or. 344)

**HARRINGTON and others v. LA ROCQUE and another.**

Filed April 6, 1886.

**GARNISHMENT—ASSIGNEE OF HEIR'S SHARE—DECREE OF DISTRIBUTION.**

When the distributive share of an heir has been ascertained, and ordered to be paid by the court, it is no longer regarded as in the custody of the law. It may therefore be garnished in the hands of the executor, and the assignee of the heir may notify the executor of the assignment for the purpose of having payment made to him, or intercepting payment to the heir after the order of distribution has been decreed by the court; but such assignee, being a stranger to the jurisdiction, may not have a decree that the heir's distributive share be paid to him.

*W. Scott Beebe and G. W. Yocum, for appellants.*

*W. Carey Johnson and F. A. E. Starr, for respondents.*

LORD, J. This was a proceeding in garnishment to reach certain moneys alleged to be in the hands of the defendant Apperson, as executor, belonging to the defendant La Rocque, under an order of distribution of the probate court. In substance, the facts are that on the eighth day of November, 1883, the plaintiff Harrington recovered a judgment against the defendant La Rocque for the sum of \$2,443.48, and costs, taxed at \$15, which judgment, on the twenty-third day of November, 1883, he sold and assigned to the plaintiffs Marx & Jorgenson. On the eighteenth day of April, 1875, an execution was issued upon said judgment, and the defendant Apperson garnished, and he certified that he had no moneys or property of the defendant La Rocque in his hands or subject to his control. The certificate of the garnishee not being satisfactory, allegations and interrogatories were exhibited against him, and he was required to answer. The record discloses that the defendant Apperson is the executor of the estate of George La Rocque, deceased, and that under such will the defendant La Rocque is a devisee, and entitled to a distributive share of said estate; that prior to the garnishment proceedings herein, and to an order of distribution of the probate court, to which we shall presently refer, the defendant La Rocque had assigned to D. P. Thompson, in consideration of money advanced and future advances, the amount due him upon distribution of said estate; that on the sixth day of April, 1885, it was ascertained that the defendant La Rocque was entitled to \$23,079.08 as his distributive share of said estate; and, among other things, the probate court directed and ordered that the defendant Apperson, as such executor, distribute the said "sum of \$23,079.08 to the defendant La Rocque, and to his assigns and order, in cash, that is to say, to David P. Thompson, his assigns, the whole thereof, to be appropriated as follows: (a) to the satisfaction of the debt due said Thompson from said La Rocque, in the sum of \$11,494.51; (b) to the lawful assigns of the said George La Rocque."

It will be observed that the defendant Apperson was served in the garnishment proceeding several days subsequently to the order of distribution. Money credits and other property are almost univer-

sally conceded to be in the custody of the law when held by executors and administrators in their representative capacity. In administering the estate they are accountable to the court, and the same reason exists that moneys or credits in their hands should not be disturbed, but considered to be in the custody of the law, as is applied to such property in the hands of the sheriff or other officer.

Mr. Freeman says:

"Moneys and other chattels, in the possession of administrators, executors, or guardians, in their official capacity, are almost universally conceded to be in the custody of the law, and are therefore neither subject to levy under execution nor to any process of garnishment." "No person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind."

And, again:

"When the share of a creditor, heir, legatee, etc., entitled to moneys in the hands of an administrator or guardian, has been settled by the court, and ordered to be paid, it is no longer regarded in the custody of the law. The right to it has become fixed, absolute, and capable of enforcement by action at law. It may, therefore, be garnished." *Freem. Ex'ns*, § 131, and notes; *Drake, Attachm.* § 499.

In considering the same subject, Mr. Waples says:

"So soon as the funds held by the executor, etc., cease to be in the custody of the law, and become recoverable as belonging to some person, legatee, heir, etc., the rule ceases to be applicable. There is sometimes a nice question as to the time when an administrator's relation to a fund, or to property, is so changed as to render him amenable to garnishment; but it is certain that he is liable when his custody ceases to be 'the custody of the law,' in its technical signification." *Waples, Attachm.* 224, and note 1 of authorities cited.

And, again:

"After an estate has been settled, and suit has been brought by attachment against one whose share therein has been ascertained, and garnishment of the executor in his personal capacity has been made, the garnishee will be held chargeable. The administrator will not be allowed to hold the fund in his hands in his official capacity, under such circumstances, to shield the heir from a payment of a just debt, to hinder the attaching creditor from making his money. The case is very different from that where the estate remains unsettled, debts due by the succession unpaid, and legacies not distributed. In the latter case, the executor cannot be compelled to pay, by process of garnishment sued out, even by a judgment of an heir whose portion still remains unseparated from the mass of the estate. Until there has been a settlement of the estate, at least, so far as the judgment of distribution, the executor or administrator cannot be reached by garnishment. It is not till the executor is ready to pay over to the heir that he is liable to garnishment in an attachment suit against the heir." *Id.* 225, 226.

It may be considered clear then when the distributive share of an heir has been ascertained, and ordered to be paid by the court, it is no longer regarded as in the custody of the law. The right to it has become fixed, and the executor ceases to hold it in his representative, but in his personal, capacity. After distribution has been decreed, it may, therefore, be garnished in the hands of the executor; and if the heir has assigned his interest or distributive share, the assignee

may notify the executor of his assignment for the purpose of requiring payment to him, or intercepting payment to the heir after the order of distribution has been decreed by the court. But the assignee of an heir is not entitled to have a decree that the distributive share of the assignor shall be paid to him. He is a stranger to the jurisdiction. For the court to assume jurisdiction in such matters would necessarily involve the validity of the assignment,—matters not relating to the acts of the intestate, but to contracts of the heirs after his decease. And just here is where the chief contention arises, counsel for the plaintiffs claiming that the probate court has no authority to make an order for distribution on the assignee of a distributee's share, and that so much of the order of distribution as purports to do it, is, at least, void; while counsel for the defendants claim that such order is not void, but if there was error, it cannot be reached collaterally. The court below acted upon the contention maintained in the last view. In this, we think, there was error which cannot be sustained either upon principle or authority.

In *Portevant v. Neylaus*, 38 Miss. 106, a similar question was raised, but the court held the decree of the probate court in favor of an assignee of a distributive share void, HANDY, J., saying:

"It is well settled by numerous decisions of this court that the probate court has no jurisdiction to decree a payment by the executor to an assignee of the distributees. *Hill v. Hardy*, 34 Miss. 289; *Dixon v. Houston*, 35 Miss. 636; *Houston v. Williams*, 36 Miss. 187; *Read v. Brown*, 36 Miss. 330. It is held in these cases that the court has no jurisdiction to decide the question of assignment, and the question arose upon a controversy as to the assignments. But the principle upon which they proceed is that the assignee is a mere stranger to the jurisdiction, and not within the power of the court. In decreeing a payment by the executor to an assignee of a distributee, the court necessarily takes jurisdiction of the question of the validity of the assignment; and that it is expressly held that the court is incompetent to do, because the assignee is in nowise connected with the administration of the estate. And, upon the same principle, it is held, in the case last cited, the court can only recognize the right of the distributee, and decree payment to him."

In *Knowlton v. Johnson*, 46 Me. 489, DAVIS, J., said:

"To hold otherwise would give the judge of probate common-law jurisdiction in matters between contesting parties, not relating to the acts of the intestate, but to contracts of the heirs after his decease. He has no such jurisdiction. The decree must be made to the heir. If he has assigned his interest, the assignee may notify the administrator of the assignment, or, if the money is paid to the heir, proceed against him at common law. So it has been recently held in New Hampshire in a similar case." *Wood v. Stone*, 39 N. H. 572.

In *Holcomb v. Sherwood*, 29 Conn. 419, it is held where an heir at law, before the distribution of the estate, conveys away his interest, the power of the probate court to order a distribution is not affected by it. The court, in making the distribution, should treat the estate, and the right of the heirs to it, as if no conveyance had been made. It is said that the manifest intention of the order of distribution is to

pay the distributive share of the defendant La Rocque to the assignee. But the decree of distribution directs the executor to distribute "the sum of \$23,709.08 to George La Rocque."

Treating as valid that portion of the order which directs payment to the defendant La Rocque, and as void all that portion which is designed to divert the payment of the assignee, it is not questioned but what the assignee had a conveyance for the defendant La Rocque's distributive share, and that the defendant Apperson, as executor, was notified of it before and at the time of the order of distribution, and that the defendant La Rocque consented that the transfer of his distributive share should be made according to the effect of that obligation. Nor do we understand there is any contention or dispute as to this, only that it is claimed that the assignment to Thompson was intended as a security for the payment of about \$14,000, which the defendant Apperson has paid over to him, and that the balance in the hands of the executor was subject to the process of garnishment. Whether the balance still in the hands of the executor at the time of the garnishment had been transferred to Thompson by force of the assignment, and was subject to his order, and as such was money in his hands due Thompson, or subject to his disposal, or what may be the facts in relation to it, are matters not within our province to decide upon this record.

The cause is remanded, and a new trial ordered.

## SUPREME COURT OF CALIFORNIA.

(69 Cal. 226)

## PEOPLE v. TREADWELL. (No. 20,140.)

Filed March 30, 1886.

1. **EMBEZZLEMENT—ATTORNEY AT LAW—PAYMENT OF PROMISSORY NOTE—CONCEALMENT AND APPROPRIATION.**

A verdict of embezzlement would be fully warranted in a case where an attorney at law, acting as agent for the payee of a note, received the amount from the drawee, and used the same for his own purposes, concealing from his principal the fact of the payment of the note.

2. **SAME—AGENT—SPECIAL SERVICE—RELATIONS AFTER TERMINATION OF SERVICE AND PAYMENT OF COMPENSATION—QUESTION FOR JURY.**

When a person is employed to render special services as agent for another, his agency ceases with performance of the services and payment of the compensation therefor, (Civil Code, § 2335,) unless there is an express understanding between them, or it may be implied from the circumstances that as to matters growing out of the original purpose of the agency the relations between the parties survived; and as to this question the jury is to decide.

3. **SAME—INFORMATION—AVERMENT—OWNERSHIP—PROMISSORY NOTE INDORSER.**

The absolute indorsement of a promissory note does not relieve the indorser from liability upon it. He has still an interest in it to see that any agent of his authorized to collect and pay it over performs his duty; and if, after his indorsement, the indorsee gives such indorser the possession and control of the note to collect interest upon it for his benefit, or to otherwise control it, that would be sufficient to sustain an averment of an ownership in an information for embezzlement.

4. **SAME—SERVICE—AGENT—SERVANT.**

In the sense of service, an agent is the servant of his principal; hence designating him in an information or indictment for embezzlement as agent and servant is not such a misnomer of his capacity as affects any of his substantial rights.

5. **SAME—SPECIFICATION AS TO PROPERTY EMBEZZLED.**

It is not necessary to specify, in an information for embezzlement, the coin, number, or kind of money embezzled.

6. **SAME—TRIAL—INSTRUCTION TO JURY—GRAVAMEN OF OFFENSE—FRAUDULENT INTENT.**

Upon a trial for embezzlement,—that is, "the fraudulent appropriation of property by a person to whom it has been intrusted,"—within section 503, Pen. Code, since an essential element of the offense is a fraudulent intent, an instruction relating to what constitutes embezzlement, and another relating to the question of fraudulent intent in the offense, both in substance containing the provisions of sections 506 and 508 of the Penal Code, were proper to be given by the court to the jury for their information.

7. **SAME—CREDIT OF WITNESS—WORD "FALSE" WITHOUT "WILLFULLY" CONNECTED THEREWITH.**

An instruction to the jury: "A witness false in one part of his testimony is to be distrusted in other parts,"—being substantially the language of subdivision 3, § 2061, Code Civil Proc., is not erroneous because of the absence of the word "willfully" before the word "false" therein.

8. **SAME—READING OF LAW BOOKS TO JURY.**

The refusal of the court to stop, at the instance of the defendant, the reading of extracts from law books to the jury by the people's counsel, in the course of his argument, is not a reversible error.

In bank. Appeal from superior court, Yolo county.

*Harding & Going* and *F. C. Baker*, for appellant.

*E. C. Marshall*, Atty. Gen., and *C. B. Darwin*, for respondent.

McKEE, J. The defendant in this action was convicted of embezzlement. He appeals from the judgment and an order denying his motion for a new trial. The motion for a new trial was made upon the grounds that the verdict was against the evidence and contrary to law, and that the court, against the objections and exceptions of the defendant, erred in matters of law at the trial, and in its instructions to the jury. As laid in the information, the charge is that on the twelfth of December, 1883, the defendant was "agent and servant" of Carl Haneke, and in that capacity received for his principal, in trust for him, the sum of \$2,102.60, lawful money of the United States, which afterwards, on the fifteenth of August, 1884, in violation of his trust, he fraudulently and feloniously converted, appropriated, and embezzled.

Upon the first ground—that the verdict was against evidence and contrary to law—it is contended that there was no evidence establishing, or tending to establish, the allegation, as laid in the information, that the money charged to have been embezzled came into the hands of the defendant by virtue of his trust as the servant and agent of Haneke. But admittedly, at the time of the transactions upon which the charge was founded, the defendant was a practicing attorney at law in the town of Woodland, in Yolo county; and on the twelfth of December, 1883, he received from Isaac Quinn \$2,102.60 in payment of a promissory note and mortgage which Quinn had given to Carl Haneke as security for the payment of the purchase money due by him for a tract of land which he had beforehand purchased from Haneke; and upon receiving the money he gave Quinn a receipt for the same, worded as follows:

"\$2,102.61

WOODLAND, CAL., December 12, 1883.

"Received of Isaac Quinn twenty-one hundred and two dollars, to be applied in payment of his note of March 26, 1881, to Carl Haneke.

"W. B. TREADWELL."

There is no question but that the money was received in payment of Quinn's note to Haneke, and if the defendant received it as the agent of Haneke, he, as an attorney at law, must have known that the law imposed upon him the duty of paying it over immediately to the person for whom he received it. But the evidence, without conflict, shows that he failed to inform Haneke of the payment of the note; that he concealed from him the fact of its payment; that he kept the money; and, as he confessed, used it for his own purposes. Upon those facts, if they were all the facts in the case, the verdict of embezzlement would be fully warranted.

But it was and is insisted that at the time the defendant received the money he was not, in fact or law, acting as the "agent and servant" of Haneke, and did not receive the money for him; but that he received it for a Mrs. Wise, to whom the note upon which the money was paid belonged, and that she authorized him to keep the money

for her. The evidence showed that Mrs. Wise was the daughter of Haneke, and it tended to show that she had advanced to her father the greater portion of the money for which the note collected by the defendant was given, and that her father, at a time when he was sick and expected to die, indorsed the note to her, so that she might receive and receipt for the moneys which were payable upon it; that she informed the defendant, as her father's agent for the collection of the note, of the indorsement, and communicated with him in that capacity. Admittedly, it was also proved that Haneke had retained and employed the defendant in the year 1880 to collect the principal and interest of a note and mortgage upon a tract of land which had been sold to Quinn, the maker of the note; that the land, at the time of the sale, was subject to a trust deed in the nature of a mortgage, to secure an indebtedness due by a former owner of the land to the Sacramento Bank; that Quinn bought and entered upon the land as purchaser, subject to the trust deed; and that while his note and mortgage were in the hands of defendant for collection, Quinn was unable to pay his own note, or the indebtedness to the bank, and the bank was about to sell the land under its trust deed unless payment of its demand was forthcoming. In that condition, Haneke, upon the advice and by the services of his attorney,—the defendant,—redeemed the land by paying the bank its demand. The bank reconveyed the land to him, and Quinn, by agreement with him, substituted for his note and mortgage a new note and mortgage trust deed, covering the principal sum of his old note and the amount of money which Haneke had paid for redemption. This substituted note was as follows:

"\$2,450.

WOODLAND, YOLO CO., CAL., March 26, 1881.

"Three years after date, for value received, I promise to pay to the order of Carl Haneke, at the Bank of California, in the city and county of San Francisco, state of California, the sum of two thousand four hundred and fifty dollars in gold coin of the United States of America, with interest thereon, in like gold coin, at the rate of one per cent. per month from date until paid. Interest to be paid every three months, and if not so paid to be added to and become a part of the principal, and draw like interest; and in case said interest be not paid every three months, this note to be collectible at the option of the holder."

The new note and trust deed were delivered, and after the latter was recorded the old mortgage was released and returned to Quinn; but Haneke retained possession of the old note until Quinn paid a balance of interest due upon it, which was not carried into the new note. The redemption by Haneke and the novation by Quinn were brought about by the services of the defendant. He drafted and supervised the execution and delivery of all the papers required to clothe the transaction with the forms of law. For those services Haneke paid him on the day the transactions were closed, and that payment, it is insisted, ended the defendant's agency, or, as he expresses it in his testimony, given as a witness in his own behalf: "My employment

ceased on the day when the deed of trust was drawn, and it was so stated at the time to the parties."

No doubt, when a person is employed to render special services as agent for another, his agency ceases with performance of the services and payment of compensation therefor. Civil Code, § 2355. Between such persons there exists no longer the relation of principal and agent, unless there is an express understanding between them, or it may be implied from their subsequent acts and conduct that the person who acted in the original transactions upon the retainer and employment of the other continued to act in the same capacity in other matters arising out of the original transactions. Whether the defendant continued to act for Haneke after payment for his past services, in collecting for him the interest and principal of the new note, was therefore a question for the jury. Upon that question there was a conflict of evidence. The jury found against the defendant, and there was abundant evidence to sustain the verdict; for it was proved that both the old and the new notes of Quinn were left by Haneke in the hands of the defendant, with authority to collect the interest due upon the old, and to forward the new to the Bank of California to be deposited, where, upon payment by Quinn of the interest, or any part of the principal, as it became due, the moneys were to be forwarded on account of Haneke. Under that authority the defendant forwarded the new note, and the first installment of interest paid upon it, accompanied with a letter, as follows:

"WOODLAND, CAL., June 24, 1881.

"*Bank of California*: I herewith inclose note of Isaac Quinn, payable to order of Carl Haneke, (516 Filbert St., S. F.,) to be held by you for collection; also check for seventy-three dollars and fifty cents, payable to the order of Carl Haneke, forwarded by Mr. Quinn in payment of first installment of interest. I have notified Mr. Haneke of the forwarding of same. Please acknowledge receipt.

"Yours,

W. B. TREADWELL.

"Any communication for Mr. Quinn may be addressed to my care at Woodland, Cal."

And on the twenty-fourth of September, 1881, he collected the old note, and gave Quinn his receipt, as follows:

"\$62.18.

WOODLAND, CAL., September 24, 1881.

"Received of Isaac Quinn, sixty-two dollars and eighteen cents, in full for balance due on promissory note, date of August 15, 1877, for \$2450.

"CARL HANEKE.

"Per W. B. TREADWELL."

Thereafter, with one or two exceptions, when he requested another to act for him in his absence from Woodland, he continued to receive from Quinn, upon the new note, the interest as it became due, and also part of the principal, which he forwarded regularly to the Bank of California on account of Haneke; and this course of dealing was continued until the collection of the note in December, 1883. Admit-

tedly, at that time, the defendant was not acting as the agent or servant of Quinn. He himself testified: "I was not representing Mr. Quinn at all. I was never the agent of Mr. Quinn at any time in the world. I did not assume to be Quinn's agent in taking his money." And to the question, "How came you to take the money?" he answered: "I took it as the agent of Mrs. Wise." Whether the defendant took the money as the agent of Mrs. Wise or of Haneke was therefore squarely in issue.

To maintain the issue on his part the defendant gave in evidence a letter, of which the following is a copy:

"SAN FRANCISCO, March 27, 1883.

"*Mr. W. B. Treadwell*—DEAR SIR: During my father's recent dangerous illness he deemed it advisable to arrange business matters to his satisfaction. He therefore indorsed and assigned the promissory note of the trust deed to me, and consequently I shall sign all receipts for interest or money sent as payment on note hereafter; the trustees have been duly notified of the change. Will you have the kindness to inform Mr. Quinn of the fact, and request him, when he forwards interest again, to have the check at the bank made payable to me. Father is much better, but being over eighty years of age he does not feel able to have the cares of business thrust upon him.

"Hoping these few lines may find your family in good health, I remain,  
"Yours, truly,  
HARRIET A. WISE."

But in connection with that letter there was given evidence tending to prove that the note was made up of two sums, viz., \$1,650 and \$800, the first of which had been advanced by the daughter to her father to enable him to redeem the land, and the second was what Quinn owed her father on the land, on the old note, and mortgage; that with the interest of these two sums of money the daughter supported herself and father, for she was an invalid, and her father was very old and infirm; so that when he became disabled by sickness from going to the bank to get his interest as it was forwarded for him by the defendant, she undertook the business, and recognizing that the defendant was her father's attorney and agent for that purpose, she communicated with him in that capacity. The indorsement of the note, in the circumstances disclosed by her letter, did not have the effect of disturbing the legal relation between Haneke and the defendant, or of revoking any authority he had to receive and forward the money; and, in fact, he did receive and forward as usual all payments made on the note until the twelfth of December, 1883, when Quinn paid him in full the amount of principal and interest due upon the note.

As a witness in his own behalf, the defendant says in his evidence that Mrs. Wise knew that he had collected the note; that at her request he concealed the fact from her father, and agreed to keep possession of the money until such time as either of them could safely reinvest it so as to make it interest-bearing for her father's support; and that, in the mean time, he should continue to forward the interest as it would become due, so as to keep up the appearance of non-payment. But the evidence of his letters and conduct and acts dis-

proved such an arrangement. It is clearly deducible from his own testimony he knew that Mrs. Wise, notwithstanding the indorsement of the note, had given full control over it to her father after recovery from his sickness, and that she recognized the defendant as her father's attorney and agent for its collection. Admittedly, after defendant received the money, he never personally spoke to or saw Mrs. Wise. In March, 1884, she fell sick of an incurable disease, and was taken to the German Hospital in San Francisco, where she lingered until October of that year and died. He says in his testimony that he corresponded with her upon the subject of the money. Not a scrap of writing from her corroborating his statement was, however, produced. He claimed that her letters to him were lost, but neither was there found among the papers of Mrs. Wise, after her death, any letters from him.

Evidently, from his own testimony, he purposely concealed the payment of the note from Haneke and his daughter. Both were wholly ignorant of the fact, and when the first quarterly interest on the note for the year 1884 would have become due and payable if the note had not been paid, they became anxious about it, because it was not forwarded to the bank, and in their distress they got a lawyer to write about the interest to the defendant, who in reply wrote as follows:

"WOODLAND, April 7, 1884.

"*A. Morgenthal, Esq.*—DEAR SIR: Yours of the fifth inst. at hand. When I telegraphed to you the other day I supposed that I could see Mr. Quinn by Thursday, but I found that he was away and out of the reach of letters. I suppose he has made a mistake as to the date. I have sent the amount to-day to the Bank of California out of my own money, as I know Mr. Quinn is all right. Please present my compliments to Mrs. Wise and Mr. Haneke, and tell them I will look out for the matter myself hereafter.

"Truly yours,

W. B. TREADWELL."

But the defendant did not forward the next quarterly interest which would have become due, and Haneke and his daughter caused a letter to be written to Quinn himself, threatening him to call in the principal of the note if he did not continue to pay the interest promptly; in answer to which Quinn wrote them in July, 1884, that he had paid the note in full to their attorney seven months before; and then, for the first time, the unspoken secret of the defendant was made known to Haneke and his daughter.

The evidence is overwhelming that Quinn, when he paid his moneys upon the note, acted with the defendant as the attorney and agent of Haneke for the purpose of receiving and forwarding them to Haneke. He so understood it from Haneke and the defendant himself. He knew nothing of the indorsement of the note to Mrs. Wise, for the defendant had not informed him. The defendant was therefore, when he received the money from Quinn, in fact the agent, or acting as the agent, of Haneke, and he is estopped in law from denying that he was the agent. "In reason," says Bishop, in his work

on Criminal Law, (section 397,) "whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. \* \* \* When a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" See *Ex parte Hedley*, 31 Cal. 108. The law of the question is, as Lord MANSFIELD put it to a party to an action who attempted to deny the assumed authority under which he had done an act attended with fraud and falsehood: "No; it shall be as you represent it to be. No man shall set up his own iniquity as a defense any more than as a cause of action."

It is claimed, however, that the information does not support the conviction because "it charges that defendant was the 'agent and servant' of Haneke; that this money came into his hands 'by virtue of his trust as said servant and agent; and that the alleged conversion was not in the due and lawful execution of his trust as said agent and servant.'" The jury must have found that the money came into the hands of the defendant as agent in fact, or as the pretended agent, of Haneke, and therefore by virtue of the confidence reposed in him; and as in either position he is estopped from denying that he received the money in that capacity, the averment in the information that he received it as "servant and agent," or as "agent and servant," is not a defective or insufficient averment of the capacity in which the money was received. True, the words "agent" and "servant" are not wholly synonymous; both, however, relate to voluntary action under employment, and each expresses the idea of service. The service performable by a servant for his employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied employment; so also is an agent, only he works not only for, but in the place of, his principal. In the sense of service, an agent is the servant of his principal; therefore designating him in an information or indictment for embezzlement as agent and servant is not such a misnomer of his capacity as affects any of his substantial rights.

But that being so, it is insisted that Haneke, having indorsed and delivered the note to Mrs. Wise, had no property in the note, or the money paid upon it, which came into the hands of the defendant. All the circumstances in connection with the indorsement and delivery of the note to Mrs. Wise were with the jury, and whether Haneke had any property in it at the time the money was received upon it was a question of fact for their determination. The absolute indorsement of a promissory note does not relieve the indorser from liability upon it. He still has an interest in it to see that any agent of his authorized to collect and pay it over performs his duty; and if, after his indorsement, the indorsee gives him the possession and control of the note, to collect interest upon it for his benefit, or to otherwise

control it, that would be sufficient to sustain an averment of an ownership in an information for embezzlement. Any legally recognizable interest in property is sufficient for that purpose.

Taken as an entirety, the charge of the court to the jury laid down the law fully and fairly and favorably for the defendant. The third and ninth of the instructions asked by the defendant were not given, but the points presented in them were covered by 1, 2, and 4 of the instructions asked by defendant, and which were given at his request.

The second, seventh, and eighth of the instructions asked by the people, and given, were taken substantially from sections 8, 506, 956, Penal Code. As abstract propositions of law they were admitted to be correct; but it is contended they were inapplicable to the case, and tended to mislead the jury in considering their verdict. The offense charged was embezzlement, which, as defined by the Penal Code, is "the fraudulent appropriation of property by a person to whom it has been intrusted." Section 503, Pen. Code. An essential element in the offense is therefore a fraudulent intent, (Id. §§ 504-508;) and as instruction 2 related to what constituted embezzlement, and instruction 8 to the question of fraudulent intent in embezzlement, and both in substance contained the provisions of sections 506 and 508 of the Penal Code, it was proper for the court to give them to the jury as matter of law for their information. Id. § 1127.

The seventh instruction, copied from section 956 of the Penal Code, was not applicable, because there was no erroneous allegation as to the person injured. The information charged the embezzlement of the personal property of Carl Haneke. As to the offense itself, the name of the party injured, or the description of the property, there was no defective allegation. It was not necessary to specify in the information, or prove at the trial, the coin, number, or kind of money embezzled. Sections 956, 1131, Pen. Code. And as the allegations of the information were sufficient in respect to these things, there was no prejudicial error in reading, as an abstract proposition, the section of the Penal Code contained in the objectionable instruction. It did not affect any substantial right of the defendant. Id. §§ 1248, 1504.

The following instruction is also challenged: "A witness false in one part of his testimony is to be distrusted in other parts." This is substantially the language of subdivision 3, § 2061, Code Civil Proc., and is correct. But it is said to be erroneous because the word "willfully" was not inserted immediately before the word "false" in the instruction. The defendant did not ask for a modification in that regard; but the omission of the word did not affect the correctness of the proposition. In *People v. Sprague*, 53 Cal. 491, a like instruction was asked by the defendant in a criminal action. The trial court did not give the instruction as asked, but of its own motion inserted the word "willfully" immediately before the word "false," and with that

correction gave the instruction to the jury, against the defendant's objection and exception, and on appeal it was held that the insertion of the word "willfully" in the instruction did not change the effect of the instruction as offered. The instruction as given was therefore virtually the instruction offered. Upon the authority of that case, *People v. Hicks*, 53 Cal. 354, and *People v. Soto*, 59 Cal. 367, were also decided.

It is also objected that the court, against the objection and exception of defendant, refused to stop the attorney for the people from reading, in the course of his argument to the jury, extracts from "books of law and reports of judicial decisions on matters of law." In *People v. Anderson*, 44 Cal. 65, the practice of reading from law-books in an argument to a jury was considered as improper; but it was held not to be a reversible error, because it was a matter within the discretion of the trial court, and unreviewable by this court, except for an apparent abuse of discretion. The record shows that the act was permitted by the court as illustrative of the argument made to the jury, and that the court, in its charge to the jury, instructed them upon the subject as follows:

"You are the exclusive judges of the testimony, and also the credibility of the evidence, and it is the duty of the court to instruct you as to the law of the case, upon which you must act in arriving at your verdict in this case. There has been a great deal of law read to you by most of the attorneys in the case, but it is your duty to decide the case according to the law as it is given to you by the court, regardless of any law which has been read to you from the books by any of the counsel in the case."

There was no prejudicial error in admitting in evidence, for the purpose for which it was offered, the letter to Quinn, written for Haneke and his daughter by their attorney in San Francisco; nor was there any abuse of discretion in postponing the trial at the request of the people to procure the attendance of witnesses.

We find no reversible error in the record. Judgment and order affirmed.

We concur: MORRISON, C. J., and ROSS, MYRICK, and THORNTON, JJ.

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(69 Cal. 202)

WEYLE v. SONOMA VAL. R. Co. and another. (No. 9,030.)

Filed March 30, 1886.

1. APPEAL—NOTICE—SUFFICIENCY.

The object of a notice of appeal is to impart the requisite information to the opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from, and if the notice is sufficiently explicit in these particulars, it should be declared sufficient.

2. SAME—ERRONEOUS DATE OF JUDGMENT IN NOTICE—EFFECT.

A mere clerical error as to the date of the judgment will not, of itself, mar the sufficiency of a notice of appeal.

3. SAME—EXCEPTION TAKEN AFTER 60 DAYS SUBSEQUENT TO JUDGMENT.

The exception that the decision in the case was not supported by the evidence cannot be entertained on an appeal from the final judgment when the

exception was not taken within 60 days from the rendition of such judgment. Code Civil Proc. 939.

4. **NEW TRIAL—NOTICE—LACK OF PARTICULARITY AS TO FAILURE OF EVIDENCE.**

A motion for a new trial, made upon the minutes of the court, and the ground taken therein that the finding and decision in the cause were not justified by the evidence, is not tenable, when the notice of such motion did not contain any specification of particulars wherein the evidence was alleged not to sustain the finding and decision.

5. **REAL PROPERTY—LAND ABUTTING HIGHWAY—EXTENT OF OWNERSHIP—CENTER OF HIGHWAY.**

By section 831, Civil Code, the owner of land bounded by a road or street is presumed to own to the center thereof, unless the contrary be shown.

6. **SAME—ALLOWANCE OF RIGHT OF WAY—CONDITIONS—CALIFORNIA CONSTITUTION.**

Section 14 of the constitution of California provides that private property cannot be taken or damaged for any public use, save upon compensation first made, etc.; and no right of way over a street is allowed for the use of any other than a municipal corporation, save upon compensation allowed by a jury; the procedure to accomplish which must be in accordance with section 1248, Code Civil Proc.

7. **SAME—INTRUSION ON PRIVATE RIGHTS—EJECTMENT.**

The owner of the fee in land, subject to the easement over the same for a public highway, may maintain ejectment for it against an intruder

Department 2. Appeal from superior court, Sonoma county.

*E. S. Lippitt*, for appellants.

*Geo. A. Johnston*, for respondent.

FOOTE, C. The transcript in this cause, being very defective, was made intelligible by stipulation between counsel on both sides, and by a certificate of the clerk of the court below, filed in this court under rule 12. The respondent makes the point that the appeal is not well taken, and should not be considered, for the reason that the notice of appeal does not give the correct date of the entry of the judgment and order denying a new trial, from which the appeal is sought to be prosecuted. The object of such a notice is to impart the requisite information to the opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from, and if the notice is sufficiently explicit in these particulars it should be declared sufficient. The notice of appeal under consideration correctly states the title of the cause, and only fails of being sufficient in all other respects, as is admitted by the respondent, because it incorrectly gives the date at which the judgment and order appealed from were entered. It also appears by the record that there has been but one judgment or order of the kind appealed from entered in the cause. From this it would appear that the said notice ought not to be declared void, but the mistake of dates merely should be regarded in this case as a clerical misprision.

The exception that the decision in the case is not supported by the evidence we cannot review on the appeal from the final judgment, because the former was not taken within 60 days from the rendition of the latter. Section 939, Code Civil Proc. The motion for a new trial was made upon the minutes of the court, and the

ground taken therein that the finding and decision in the cause were not justified by the evidence is not tenable, and the motion was properly denied, as the notice of motion did not contain any specifications of particulars wherein the evidence was alleged not to sustain said findings and decision. Section 659, subd. 4, Code Civil Proc.; *Eddelbuttel v. Durrell*, 55-Cal. 277.

Appellants claim, further, that the court should have dismissed the action as to Mr. Donahue; that a demurrer filed to the complaint should have been sustained; and that the findings do not support the judgment. The action was ejectment, to recover from the defendants, the Sonoma Valley Railroad Company and Peter Donahue, the possession of the north half of Spain street, extending for 350 feet in front of and adjoining lot 27 and part of lot 28, in the town of Sonoma, in Sonoma county, California, subject only to the easement of the public to use it as a street. It is claimed that in the complaint it did not properly appear how Mr. Donahue was jointly or severally interested with the railroad company defendant in the acts complained of; that the complaint did not state facts sufficient to constitute a cause of action; and that it was uncertain in not making it to appear whether the plaintiff sued the defendants for obstructing a highway, or for damage to private property by reason of such obstruction. It is not doubtful for what purpose the suit was brought; it was to recover in ejectment the premises sued for, and damages for its unlawful withholding by the defendants. Mr. Donahue was properly joined as a party defendant as to all the acts complained of by the plaintiff, and there is nothing in the transcript which discloses any error on the part of the court in not dismissing the action as to him.

The complaint alleged ownership in fee by the plaintiff to the premises in controversy, and that while he was so seized and possessed he was ejected and ousted therefrom by the defendants, who have from that date, the thirty-first of January, 1882, withheld the possession thereof from him. Restitution of the premises and damages for its detention are prayed for. But the appellants contend that inasmuch as the plaintiff has alleged title and right of possession to the premises, subject to the easement of the public to the use thereof as a street, that he has mistaken his remedy; that, as against the defendants, a steam railroad corporation, and Peter Donahue, operating their road over the street, such an action will not lie, although perhaps one for damages might be maintained, as the injury was especial in its nature. And it is further urged by the defendants that as the public had the right to use the street in common with the plaintiff, that although the fee of it might be in him, the exclusive right of possession thereto had never been or could be.

There is no dispute about the fact that the plaintiff's lots were bounded by Spain street in the former pueblo, and are now bounded thereby in the present town of Sonoma. By section 831, Civil Code,

the owner of land bounded by a road or street is presumed to own to the center of the way unless the contrary be shown; and if it is described in a deed as so bounded, it will be considered as extending to the center of the street or road, unless a contrary intention is shown. Section 1112, Civil Code; section 2077, subds. 4-6, Code Civil Proc.; *Moody v. Palmer*, 50 Cal. 31; *Kittle v. Pfeiffer*, 22 Cal. 484; *Webber v. California & O. R. Co.*, 51 Cal. 425. And in *Coburn v. Ames*, 52 Cal. 385, it was held that the owner of the fee in land, subject to the easement over the same for a public highway, may maintain ejectment for it as against an intruder.

But the appellants allege that section 465, Civil Code, subd. 5, gives them the absolute right to use the street for the purpose of running their steam railroad over it; that section 470, Civil Code, only restricts such user in a case where it has not been granted by the city authorities over some street in its corporate limits; and that the town of Sonoma was not incorporated at the time the street was taken possession of by them, as shown by the complaint. The state constitution provides, however, that private property cannot be taken or damaged for any public use, save upon compensation first made, etc.; and no right of way over a street is allowed for the use of any other than a municipal corporation, save upon compensation ascertained by a jury, etc., (section 14, art. 1, Const. Cal.;) the procedure to accomplish which must be in accordance with section 1248, Code Civil Proc.

We cannot agree to the rightfulness of defendants' contention that a different rule should prevail with respect to the ownership of a street up to its center or thread, on which one's lot abuts, where sales of Sonoma pueblo lands have been made by the commissioners authorized so to do from sales of lands made by other persons. St. 1867-68, p. 578.

The demurrer was, we think, properly overruled. And the findings which, among other things, declare the plaintiff to be the owner of the fee and entitled to the possession of the lots on Spain street, in the town of Sonoma, and of the said street in front of said lots to its center, and that defendants took possession of said street unlawfully, and without any grant or permission from the board of supervisors of Sonoma county, and ejected and ousted plaintiff therefrom on January 31, 1882, and have so continued to do, support the judgment.

The judgment and order denying defendants a new trial should be affirmed.

We concur: BELCHER, C. C., and SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

v.10p.no.7-33

**HERTING v. SUPERIOR COURT. (No. 11,368.)**

Filed March 31, 1886.

**APPEAL FROM JUSTICE'S COURT—UNDERTAKING—JUSTIFICATION OF SURETIES.**

On an appeal from a justice's court, if the sufficiency of the sureties on the undertaking on appeal is excepted to, and they fail to justify, the appellant cannot file a new undertaking with sureties in place of the former without giving to the adverse party the notice required by statute; (Code Civil Proc. Cal. § 978;) and if he does so, the appeal is not perfected, and the appellate court acquires no jurisdiction. On authority of *Wood v. Superior Court*, 7 Pac. Rep. 200.

Department 2. Application for writ of *certiorari* for the purpose of reviewing and annulling the proceedings of the superior court in taking jurisdiction of the cause of *Holt v. Herting* on appeal from the justices, and refusing to dismiss the same on motion. The motion to dismiss the appeal was based on the ground that the respondent had filed and served on appellant's attorney an exception to the sufficiency of sureties to the undertaking on appeal, and that a new undertaking had then been filed with a new surety thereto, but without notice of the justification of such surety to said undertaking being given to the respondent or his attorney.

*B. F. Thomas and A. R. Cotton*, for petitioner.

*McNulta & Oglesby*, for respondent.

By THE COURT. On the authority of *Wood v. Superior Court*, 7 Pac. Rep. 200, it is ordered and adjudged that the proceedings of the superior court of Santa Barbara county in the action therein, entitled *Holt v. Herting*, on appeal from the justice's court, be, and the same hereby are, annulled.

## SUPREME COURT OF KANSAS.

(35 Kan. 126)

## BARR v. RANDALL and Wife.

Filed April 9, 1886.

## TAXATION—TAX DEED—VALIDITY.

Where a person owns a tax-sale certificate, and is entitled to have a valid tax deed executed thereon, but such person is at the time the county clerk of the county in which the tax deed is to be executed, and such person as county clerk executes the tax deed to himself as an individual, and the tax deed is immediately recorded, *held*, that it is not absolutely void, and that after the statute of limitations relating to tax deeds has completely run in its favor it will be valid, and not even voidable.

Error from Marshall county.

*E. W. Sargent, Cal. T. Mann, and George W. Clawson*, for plaintiff in error.

*Doniphan & Reed and A. E. Parks*, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment, brought by S. M. Barr against William Randall and Elizabeth Randall, his wife, to recover certain real estate situated in Marshall county, Kansas. The action was tried before the court, without a jury, and the court, after making certain findings of fact and conclusions of law, rendered judgment in favor of the defendants, and against the plaintiff, for costs; and the plaintiff, as plaintiff in error, now brings the case to this court for review.

It appears that one James C. Smith held the original patent title to the land in controversy, and that the plaintiff claims under a quit-claim deed from him. The defendants claim through intermediate conveyances under a tax deed executed by the county clerk of Marshall county to Russell S. Newell. It appears that on May 6, 1862, the taxes against the land in controversy for the year 1861 were still due and unpaid; that on that day the land was sold for such taxes to Marshall county, and on the same day the county treasurer assigned the tax-sale certificate to Russell S. Newell. Newell at the time was county clerk of Marshall county, but under the laws as they then existed the county clerk had nothing to do with the tax sale, or the tax-sale certificate, or the assignment of the tax-sale certificate. All these things were then embraced within the duties of the county treasurer. Newell afterwards paid the taxes for the years 1862 and 1863, and on May 13, 1864, by the authority vested in him as the county clerk of Marshall county, and in pursuance of said tax-sale, and the assignment of the tax-sale certificate, and the payment of the taxes for the years 1861, 1862, and 1863, executed to himself as an individual the tax deed in controversy. In other words, the grantor in the tax deed appears to be Russell S. Newell, the county clerk of Marshall county, and the grantee appears to be Russell S. Newell; and the parol evidence in-

troduced on the trial shows that the two are one and the same person. On May 14, 1864, this tax deed was duly recorded in the office of the register of deeds of Marshall county. On July 17, 1875, Newell, by a quitclaim deed, conveyed the land in controversy to I. C. Legere. On June 5, 1876, Legere, by a quitclaim deed, conveyed the same to Mary A. Watkinson. On March 21, 1881, Mary A. Watkinson, by a quitclaim deed, conveyed the land to the defendant William Randall; and Randall immediately took possession of the land, and has continued in the possession thereof ever since, and has made lasting and valuable improvements thereon, and he and his grantors have paid all the taxes assessed against the land from the year 1861 up to the present time. On January 25, 1884, the plaintiff, Barr, commenced this action to eject the defendant Randall and his wife from the premises.

The only question involved in the case is whether the aforesaid tax deed is absolutely void or not; and the principal objection urged against its validity is that it was executed by Russell S. Newell, as county clerk, to himself, as an individual. The sale seems to have been regular and valid in every particular. The purchase of the tax-sale certificate by Newell from the county treasurer seems also to have been regular and valid; but concerning this matter we shall have more to say hereafter. So, also, does the assignment of the tax-sale certificate seem to have been regular and valid; and at the time when all these proceedings were had the county treasurer, under the statutes, had the right to sell and assign the tax-sale certificate to any person who desired to purchase, without any aid or assistance from the county clerk or consultation with him. Hence, at the time when the tax deed was executed, Russell S. Newell, as an individual, had an unquestionable right to the tax-sale certificate, and an unquestionable right to have a valid tax deed executed thereon to himself; and if he had resigned his office of county clerk, and another person had been appointed to take his place, he could have compelled such other person, by a writ of *mandamus*, to execute to him a valid tax deed.

There is another supposed irregularity, as follows: It is probable that Newell paid the entire purchase money for the tax-sale certificate in county scrip, and not in cash, or in the various warrants on the treasuries of the state, cities, townships, school-districts, etc., to which the various items of the consideration for the tax-sale certificate belonged. This may not be the case, however; for, presumptively, the officers did their duty. Presumptively, also, from the *prima facie* character of the tax deed in whose favor the statute of limitations has long since completely run, everything, except the fact that Newell appears to be both the grantor and grantee in the tax deed, was regular and valid. Also, upon the face of all the tax proceedings prior to the tax deed, everything seems to have been regular and valid. But Newell, who was a witness on the trial for the plaintiff, testified in terms that he paid for the tax-sale certificate in question in county scrip.

Now, it was unquestionably proper for him to pay a portion of the consideration for the tax-sale certificate in county scrip, and possibly all, under the statutes as they then existed. Indeed, it would be difficult to give a good reason why all might not have been thus paid under the statutes as they then existed. But supposing, for the purposes of this case, that such a payment was not proper, still such payment did no harm to the original owner of the land, or to any grantee of his, or to any person claiming under him.

Under the decisions of this court, made in an early day under the statutes as they then existed, the original owner or his grantee had the same right to redeem the land from the taxes, and the right to use the same kind of funds in doing so, after the assignment of the tax-sale certificate as before. *Judd v. Driver*, 1 Kan. 455, 464, 465; *Guittard T'p. v. Marshall Co.*, 4 Kan. 388, 397. See, also, Comp. Laws 1862, c. 198, § 8, proviso. And, further, neither the original owner nor his grantee, in the present case, has ever attempted to redeem the land from the taxes; but totally abandoned the land from the year 1861 up to 1884, when this action was commenced, a period of nearly 24 years. Hence this irregularity of paying the entire consideration for the tax-sale certificate in county scrip, if it can be called an irregularity, is of such small dimensions, and of such inconsiderable consequence, that we shall hereafter entirely ignore it and exclude it from all further consideration.

The only irregularity, then, of any considerable consequence is the one that the person who executed the tax deed as an officer and as grantor was also the individual person to whom the tax deed was executed as grantee. We shall assume that the fact that the grantor and the grantee mentioned in the tax deed were one and the same person, acting and receiving merely in different capacities and in different relations, would render the tax deed voidable, and that any person having an interest in avoiding the tax deed might do so at any time before the statute of limitations had completely run in its favor; but the question then arises, is the tax deed so absolutely void that no statute of limitations can make it good? The tax deed in the present case was on record nearly 20 years before this or any other action was commenced to defeat or avoid the same, and before this or any other action was commenced which could have the effect of defeating or avoiding the same. We hardly think that the tax deed in this case ever was more than voidable; and we are also inclined to think that the statute of limitations has so completely run in its favor that all action having for its object the defeat or avoidance of the tax deed is now completely barred. The tax sale was itself unquestionably valid. The transfer of the tax-sale certificate, notwithstanding the aforesaid slight irregularity, was also unquestionably valid; and Newell, as before stated, had an absolute right to a tax deed, and no one but himself as county clerk could execute the same; and there is no statute which in terms prohibits him from ex-

executing the same, or which prohibits any county clerk from executing a valid tax deed to himself. We shall assume, however, upon general principles, that such a tax deed would be voidable so long as no statute of limitations had completely run in its favor; but is such tax deed absolutely void? Possibly it would have been better for Newell to have resigned his office of county clerk, and allowed his successor in office to execute the tax deed to him; or, perhaps, it would have been better still for him to have held his tax-sale certificate until his term of office had expired, and then to have allowed his successor to execute the tax deed. But he chose to execute the tax deed himself, and in doing so he did not act in his own individual capacity, but acted in the capacity of county clerk,—in the capacity of agent for the county or for the public,—and possibly, also, as agent for the original owner; and if his action is wrong or unjustifiable, it would seem that he could be called to an account only by his principal, and within reasonable time, and not by some other person or persons, and after he had been favored by the complete running of a statute of limitations. Generally, where an agent sells the property of his principal to himself, no one but his principal can complain, and his principal may ratify and confirm the sale, and make it absolutely good. *Eastern Bank v. Taylor*, 41 Ala. 93; *Leach v. Fowler*, 22 Ark. 143; *Ellis v. Peck*, 45 Iowa, 112; *Whart. Ag.* § 235.

Wherever an agent, in acting for his principal, also deals with himself, the principal may ratify and confirm such dealings, and make them good, and in all cases such dealings will be held to be valid unless the principal chooses to hold them invalid. Such dealings are not void, but only voidable, at the option of the principal. See authorities above cited and hereafter cited. If they were absolutely void, then any person, under any circumstances, and in any case, could treat them as void, which we suppose would be carrying the doctrine of invalidity for irregularities further than any person would desire. Now, the county clerk was the agent of the public, and executed the tax deed as the agent of the public, and under an express statutory authority, and whether he was also the agent of the original owner or not can make no difference. In either case, the tax deed would not be absolutely void, but at most only voidable. If we should assume, however, that a county clerk, when executing a tax deed, is not only the agent for the public, but is also the agent for the original owner of the land, still we would think that the original owner in the present case would not have much to complain of. The original owner in the present case, including his grantee, had failed to pay his taxes, and his land had been sold therefor, and a tax deed was due thereon, and Newell, as county clerk, was the only person who could execute it, and Newell, as an individual, was the only person who was entitled to receive it; and there is nothing in the statutes that would prevent Newell, as county clerk, from executing the tax

deed to Newell, as an individual; and whether a valid tax deed were executed to Newell or to some one else, or by Newell or by some one else, could not make the slightest difference to the original owner, or to any one holding under him.

This objection to the tax deed is purely technical, and yet it is not founded upon any inflexible rule or mandate of written law, but only upon some supposed general principles of unwritten law. Besides, the original owner and his grantee, the present plaintiff, abandoned the land for about 24 years, and allowed the defendant Randall and his grantors to pay all the taxes thereon, and to make lasting and valuable improvements thereon. No fraud is shown in the present case, nor the slightest unfairness. Everything seems to have been fairly done, and in good faith, and in accordance with the letter of the statute, except as we have heretofore stated, and the worst that can be urged against the tax deed is the peculiar mode in which it was executed. Hence we would think that the tax deed ought to be held valid, after the statute of limitations has completely run in its favor. By abandoning the land for so great a time, and allowing the statute of limitations to run in favor of the tax deed, the plaintiff and his grantor have ratified, confirmed, and made good the irregular execution of the tax deed, (*Pierce v. Benjamin*, 14 Pick. 356; *Bassett v. Brown*, 105 Mass. 551; *Greenwood v. Spring*, 54 Barb. 375; *Marsh v. Whitmore*, 21 Wall. 178,) and, indeed, every other supposed irregularity or illegality has been cured by the running of the statute of limitations.

In this state the statute of limitations relating to tax deeds purports, by its terms, to apply to all tax deeds, whether good or bad, or void or voidable, "except in cases where the taxes have been paid or the land redeemed as provided by law." Gen. St. 1868, c. 107, § 116; Comp. Laws 1879, c. 107, § 141. Now, the plaintiff in this case does not claim that he or his grantor ever paid the taxes on the land, or ever offered to pay them, or ever redeemed the land from the taxes, or ever offered to redeem the same. He merely sets up supposed irregularities to defeat the tax deed. We would also refer to the following cases, not as being entirely applicable to this case, but as furnishing some support to the views we have herein expressed: *Cuttle v. Brockway*, 24 Pa. St. 145; *Russel v. Reed*, 27 Pa. St. 166; *Cuttle v. Brockway*, 32 Pa. St. 45; *Chorpenning's Appeal*, 32 Pa. St. 315; *Ellis v. Peck*, 45 Iowa, 112; *Morton v. Waring*, 18 B. Mon. 72, 84, *et seq.*

There are some other objections urged against the tax deed, but we do not think that any of them are tenable. We might, however, in conclusion, say that even if it were true in the present case that the tax-sale certificate which was made by the county treasurer in 1862 was so made for an amount which did not include the county treasurer's own fees, but was sufficient in every other respect, the fact that the amount did not include the county treasurer's own fees

would not render the tax deed afterwards issued thereon void. *Case v. Frazier*, 30 Kan. 343; S. C. 2 Pac. Rep. 519.

The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

HORTON, C. J. It appears from the evidence in this case that Russell S. Newell was the clerk of Marshall county from 1862 to 1864; that he had to take his pay for his services in scrip worth from 25 to 35 cents on the dollar; and that while acting as county clerk he procured assignments of tax-sale certificates to himself under an arrangement with the county treasurer, but did not, as a general thing, pay for the certificates until redemptions were made. When he did pay, the county treasurer accepted county scrip in full payment. When he did not have enough of his own scrip to pay for these assignments, he obtained scrip from the county treasurer so to do. In this way both the county clerk and the treasurer realized dollar for dollar from their scrip. The county treasurer was a merchant, and in addition to receiving county scrip for his services also received it in payment of his goods at a depreciated price. This collusive arrangement between these officers, of course, cannot be sustained; and I am very clearly of the opinion that any person having an interest therein could have set aside the alleged assignments of the tax-sale certificates made in pursuance of the foregoing arrangements; and I am further of the opinion that in this case any person having an interest in avoiding the tax deed in controversy might have done so at any time before the statute of limitations had fully run in its favor. But it does not appear that James C. Smith, the patentee of the land in controversy, or any one for him, or holding under him, ever offered to redeem the land from the sale of taxes before the issuance of the tax deed, or before the statute of limitations had completely run in its favor. Indeed, it appears from the facts that the original owner abandoned the land for a very great length of time, and the holder of the tax deed and his grantees have paid all the taxes from 1861 to the present time, and have also made lasting and valuable improvements thereon. This action was not commenced until January 25, 1884, nearly 20 years after the tax deed was recorded; therefore I think that after the statute of limitations has fully run, considering all of the circumstances of this case, it is too late now to say the tax deed is absolutely void upon its face.

In the case of *Cole v. Moore*, 34 Ark. 582, to which we are referred by counsel for plaintiff in error, where the purchase at a tax sale by a county clerk was held illegal, the tax sale was made on August 2, 1869; the action to set aside the certificate of purchase was brought April 19, 1870, less than one year. No question of the statute of limitations running in favor of any deed or tax certificate was in issue, argued, or discussed.

(35 Kan. 124)

## MACK v. PRICE.

Filed April 9, 1886.

## 1. EJECTMENT—APPEAL—IMPROVEMENTS—OCCUPYING CLAIMANT.

Where a defendant, who is defeated in an action in the nature of ejectment, after the verdict is rendered, files in the office of the clerk of the district court a written request for the benefit of the occupying claimant law; and the judgment recites that the defendant has made claim for improvements as an occupying claimant, but such defendant stops with said request, and does not demand a jury for the assessment of his improvements, and excepts to the findings of fact and conclusions of law, and to the judgment rendered; and also obtains time in which to make and serve a case to review the rulings of the trial court: *held*, such defendant is not estopped by the steps so taken by him from instituting and maintaining proceedings in error to reverse the judgment rendered in the action against him. *Bradley v. Rogers*, 83 Kan. 120, 8 C. 5 Pac. Rep. 874, distinguished.

## 2. TAXATION—TAX DEED—VALIDITY.

A tax deed that is substantially in the form prescribed by the statute is valid on its face, although immaterial words of the statutory form are omitted, if everything of substance required by the statute as to form is found in the deed, when all of the recitals of the deed are taken together and so considered.

## 3. SAME—RECITALS.

Where a tax deed recites that no person offered to pay the taxes, interest, and costs (naming the amount) then due and remaining unpaid on certain lots, (describing the same,) nor any part or parcel thereof; and that the whole of said real estate was bid off by the county treasurer for the county for the amount of taxes, penalty, and charges; and that subsequently, upon a date named, the county clerk of the county duly assigned the certificate of sale of said real estate, and all the right, title, and interest of the county therein, and to said property, to one M.: *held*, that the words "was the least quantity bid for" were properly omitted from the tax deed, as the county is not a voluntary or a competitive bidder. *Larkin v. Wilson*, 28 Kan. 513, and *Magill v. Martin*, 14 Kan. 67, followed, and *Noble v. Cain*, 23 Kan. 493, distinguished.

## Error from Atchison county.

Action commenced July 28, 1883, by John M. Price against William Mack, for the recovery of the immediate possession of lots 12 and 13, in block 27, North Atchison, Atchison city. The defendant answered, admitting possession, and claiming title in himself under a tax deed of December 7, 1869. Trial had at the November term of court for 1884, by the court, without a jury. The court made the following findings of fact:

"(1) At the commencement of this action the plaintiff was the owner in fee-simple of the real property in controversy, to-wit, lots 12 and 13, block 27, North Atchison, an addition to the city of Atchison, in Atchison county, Kansas, by a chain of conveyances from the government of the United States, the original owner, except as the same may be affected by the tax proceedings and tax deed hereinafter mentioned. Said lots were vacant, unimproved, and unoccupied until the defendant took possession of the same as hereinafter stated, and no improvements have ever been made thereon except by the defendant.

"(2) At the commencement of this action the defendant was in the actual and visible possession and occupation of said real property, and he had been in such possession and occupation thereof ever since the year 1870, during which year he built a house thereon, into which he moved with his family. Ever since May 27, 1871, his possession thereof was under a claim of right by virtue of a tax deed executed by Chas. W. Rust, county clerk of said county of

Atchison, of date December 7, 1869, acknowledged May 27, 1871, and recorded on the same day in book W, at page 469, in the office of the register of deeds of said county. With the following exception, Exhibit A attached to the defendant's amended answer is a substantial copy of said tax deed, and the acknowledgment thereof, namely: The concluding part of the body of said original deed is as follows, namely:

" 'In witness whereof I, Chas. W. Rust, county clerk as aforesaid, have hereunto subscribed my name, and affixed my official seal, on this seventh day of December, A. D. 1869.

[Signed]

" 'CHAS. W. RUST, County Clerk.'

"Whereas, in said Exhibit A the concluding part of the body of said deed as therein copied is as follows, namely:

" 'In witness whereof I, Chas. W. Rust, county clerk as aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name, and affixed the official seal of said county, on this seventh day of December, A. D. 1869.

[Signed]

" 'CHAS. W. RUST, County Clerk of Atchison Co., Kansas.'

"The defendant paid \$1.50 as fee for recording said deed. The seal actually used by the county, as established by the board of county commissioners and kept in the office of the county clerk, was the one used and affixed to the original deed herein.

"(3) From evidence outside of said deed it appears that said real property was liable to taxation for the year 1862, and ever since; and that the same was assessed upon the assessment roll of said year as follows: Lot 12, block 27, North Atchison, to F. G. Adams, valuation \$20; lot 13, block No. 27, North Atchison, to F. G. Adams, valuation \$20. And said lots were placed on the tax rolls of said year in accordance with said assessment roll, each lot being valued at \$20, and the total tax on each lot being 46 cents, and F. G. Adams being named as owner. From the record of tax sales it appears that said lot 12, assessed to F. G. Adams, was sold to the county May 15, 1863, for 80 cents. Certificate No. 2317, tax of 1863, \$1.51; tax of 1864, \$.74; tax of 1865, \$2.04; tax of 1866, \$.99; tax of 1867, \$1.29; tax of 1868, \$1.22; assigned to William Mack, June 3, 1869. Lot 13, the same in all respects as lot 12, except that the certificate number is 2318. The Duplicate Book of Tax Sales in the county clerk's office shows all of the facts stated in the original Book of Tax Sales, and also the further fact that each of said lots were deeded to William Mack, December 7, 1869.

"(4) The tax-sale notice under which said lots were sold reads as follows:

" 'Delinquent Tax-list of Atchison County, for State, County, School, and Township Tax for the Year 1862: I will offer for sale on the first Tuesday of May next so much of each parcel of the following described lands or lots as may be necessary to pay the taxes thereon, in front of the county treasurer's office, in the city of Atchison, state of Kansas, commencing at 10 o'clock A. M. of said day, and continuing from day to day until disposed of.

[Signed]

" 'Atchison, April 4, 1863.'

" 'FRANK BIER, County Treasurer.

"The accompanying list described said two lots.

"(5) The notice of expiration of time for redemption from said sales is as follows:

" 'Tax Notice of the Expiration of the Time Limited for Redemption of Lots and Lands Sold at the Tax Sales made in May, 1863, for Delinquent Taxes of the Year 1862: Notice is hereby given that all lands and lots

sold on May the 5th, and subsequent days, remaining unredeemed, will be conveyed to the respective purchasers thereof unless redeemed on or before the day limited and hereinafter mentioned. The day of expiration, the amount of tax, including interest, to the last day of redemption, and the tax of 1864 also included, is as follows:

[Signed]

" 'SAMUEL C. KING, County Treasurer.'

"In the list on file in the county clerk's office said lots 12 and 13 are under date of May 15, 1865. There is no name opposite the lots, nor upon the list, to indicate the ownership, nor to whom assigned. The amount carried out opposite lot 12 is \$4.45, and the amount carried out opposite lot 13 is \$5.45. Said notice was published in the *Atchison Champion*, a weekly newspaper published in said Atchison county, and of general circulation therein, on December 8, 1864, December 15, 1864, December 22, 1864, and December 29, 1864, and in no other manner and at no other dates.

"(6) Said lots were sold for the taxes of 1869, and the taxes of 1870 were charged upon the sale, the aggregate taxes for the two years being as follows: On lot 12, \$3.44; and on lot 13, \$9.13; total, \$12.57. On May 6, 1871, the defendant redeemed the same from said sale, and for said taxes of 1869, 1870, paying for such redemption as follows: For lot 12, \$5.16; and for lot 13, \$12.27; total, \$17.43, including certificate of redemption."

"(7) The defendant paid the subsequent taxes on said lots as follows: Taxes of 1871, paid January 1, 1872, on lot 12, \$1.53, on lot 13, \$7.64; taxes of 1872, paid May 5, 1873, on lot 12, \$1.66, on lot 13, \$3.32; taxes of 1873, paid May 11, 1874, on lot 12, \$1.85; on lot 13, \$7.71; taxes of 1874, paid June 18, 1875, on lot 12, \$1.64, on lot 13, \$4.62; taxes of 1875, paid June 20, 1876, on lot 12, \$2.26, on lot 13, \$5.81; taxes of 1876, paid June 20, 1877, on lots 12 and 13, \$4.55; taxes of 1877, paid June 20, 1878, on lots 12 and 13, \$4.86; taxes of 1878, paid June 20, 1879, on lots 12 and 13, \$4.80; taxes of 1879, paid June 20, 1880, on lots 12 and 13, \$4.97; taxes of 1880, paid June 20, 1881, on lots 12 and 13, \$6.07; taxes of 1881, paid June 20, 1882, on lots 12 and 13, \$5.66; taxes of 1882, paid June 20, 1883, on lots 12 and 13, \$5.23; taxes of 1883, paid June —, 1884, on lots 12 and 13, \$5.57."

And thereon made the following conclusions of law:

"(1) Said tax deed is not regular on its face, and is not in substantial compliance in form with the provisions of law, and it bears evidence upon its face that the provisions of the law were not complied with, and in the two proceedings prior to the execution of said tax deed the law was not complied with.

"(2) The plaintiff is the owner of the real estate in controversy, and his cause of action is not barred by the statute of limitations.

"(3) Before the plaintiff is let into possession of said real property he should be required to pay to the defendant the full amount of all taxes paid by the defendant upon said real property, with interest thereon at the rate of fifty per cent. per annum, and costs up to the date of said tax deed, December 7, 1869; including the cost of said tax deed, and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum; and the further amount of taxes paid by the defendant after the date of said tax deed, with interest thereon at the rate of twenty-five per cent. per annum.

"(4) Subject to said charge for taxes, and to the defendant's rights, if any, as an occupying claimant, the plaintiff is entitled to recover said real property, with costs of suit.

D. MARTIN, District Judge."

A copy of the tax deed attached to the answer, and marked Exhibit A, is hereinafter set forth in full. The words therein inserted

in italics are found in the statutory form, but not in the deed. The words in parenthesis are found in the deed, but not in the statutory form:

"Know all men by these presents that whereas, the following described real property, viz., lots twelve and thirteen, (12 and 13,) block No. twenty-seven, (27,) North Atchison, Atchison city, situated in the county of Atchison and state of Kansas, was subject to taxation for the year A. D. 1862; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the fifteenth day of May, A. D. 1863, by virtue of the authority in him vested by law, at an adjourned sale, *of the sale* begun and publicly held on the first Tuesday of May, A. D. 1863, expose to public sale at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of (the) taxes, interest, and costs then due and unpaid *upon* said property; and whereas, at the place aforesaid, no person offering to pay the sum of one dollar and sixty cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property for lots twelve and thirteen, block No. twenty-seven, (27,) North Atchison, (nor any part or parcel thereof,) *which was the least quantity bid for*, the whole of said real property was bid off by the said county treasurer for said county of Atchison for the amount of taxes, penalty, and charges thereon as aforesaid; and whereas, the county clerk of said Atchison county did, on the tenth day of August, A. D. 1869, duly assign the certificate of the sale of the property as aforesaid, and all the right, title, and interest of (said) Atchison county in and to said property, to William Mack, of the county of Atchison and state of Kansas; and whereas, the subsequent taxes of the year 1864, 1865, 1866, 1867, 1868, amounting to the sum of twenty and 70-100 dollars, (and seventy cents,) have been paid by the purchaser (and assignee of said certificate) as provided by law; and whereas, five years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law.

"Now, therefore, I, Chas. W. Rust, county clerk of the county aforesaid, for and in consideration of the sum of twenty-two dollars and thirty (30) cents taxes, cost, and interest due on said land for the years (A. D.) 1863, 1864, 1865, 1866, 1867, and 1868, to the treasurer, paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said William Mack, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said William Mack, his heirs and assigns, forever, subject, however, to all rights of redemption provided by law.

"In witness whereof I, Charles W. Rust, county clerk, as aforesaid, *by virtue of authority aforesaid*, have hereunto subscribed my name, and affixed (my) *the official seal of said county*, on this seventh day of December, A. D. 1869.

[Seal.]

"CHAS. W. RUST, County Clerk.

"Witnesses: WM. H. WILLIAMS.

"D. E. MERWIN.

"(The) *State of Kansas, Atchison County, ss.*: I hereby certify that before me, J. J. Locker, a register of deeds in and for said county, personally appeared the above-named Chas. W. Rust, clerk of said county, personally known to me to be the clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of said county, and *who*

acknowledged the execution of the same to be his voluntary act and deed as clerk of said county, for the purpose therein expressed.

"Witness my hand and official seal this twenty-seventh day of May, A. D. 1871.

[Seal.]

"J. J. LOCKER, Register of Deeds."

The defendant excepted to conclusions of fact 3, 4, and 5, and to conclusions of law 1, 2, 3, and 4. Judgment having been entered accordingly, the defendant further excepted, and brings the case here.

*Martin & Orr*, for plaintiff in error.

*Coates & Bird*, for defendant in error.

HORTON, C. J. John M. Price is the owner of the patent title to the lots in controversy. These lots were subject to taxation for the year of 1862, and were sold for delinquent taxes May 15, 1863, and bid in by the treasurer of Atchison county. The certificate of sale was assigned by the county clerk of said county August 10, 1869, to William Mack, and a deed issued to him for the lots on December 7, 1869, which was recorded May 25, 1871. In 1870, Mack took actual possession of the lots, and has ever since occupied them as a homestead for himself and family. The trial court determined that the tax deed under which Mack claims is not in substantial compliance with the provisions of law.

Two questions are presented by the record: *First*. Is Mack estopped by the steps he has taken in order to avail himself of his rights as an occupying claimant, from instituting proceedings in error to reverse the judgment? *Second*. Is the tax deed sufficiently regular on its face to set the statute of limitations in operation? The trial court filed its findings of fact and conclusions of law on December 2, 1884, and rendered judgment upon that day. The part of the judgment following the conclusions of fact and law was not actually entered upon the journal until December 6th. Price was adjudged the owner in fee simple of the lots in dispute, and entitled to the possession thereof, subject to all taxes, interest, and costs allowed by law, and to the rights of Mack, if any, as an occupying claimant. On December 5, 1884, Mack filed in the office of the clerk of the district court his motion for the benefit of the occupying claimant act, which motion was allowed; and when the judgment was entered it cited that Mack had made claim for improvements as an occupying claimant. On January 16, 1885, Price filed in the office of the clerk of the district court his written demand for a jury to assess the value of the improvements.

In *Bradley v. Rogers*, 33 Kan. 120, S. C. 5 Pac. Rep. 374, the defeated parties did not stop with merely requesting to be reimbursed for the taxes, interest, and costs which they had paid upon the property in controversy, and for the benefit of the occupying claimant law, but they went further, and demanded a jury for the assessment of their improvements, and such jury was awarded to them by the court. In

this case Mack made no demand for a jury, and the action of Price in making such demand cannot be considered to his injury, and therefore cannot be urged as an election by him to take the rights of a defeated party. We followed in *Bradley v. Rogers* a Nebraska case, but are unwilling to extend the law of election concerning the institution of proceedings under the occupying claimant law any further than already announced. *Buchanan v. Dorsey*, 11 Neb. 373; S. C. 9 N. W. Rep. 546.

Mack excepted to the findings of fact and conclusions of law of the trial court, and also to the judgment as rendered. He filed a motion for a new trial, and, when that was overruled, he excepted and obtained 20 days' time in which to make and serve a case made to review the rulings of the trial court. Having made no demand for a jury for the assessment of his improvements as an occupying claimant, and having made the exceptions he did, we do not think the steps taken by him after the rendition of the judgment debar him from instituting and maintaining these proceedings in error to reverse the judgment.

In support of the conclusion of the trial court that the tax deed is not in substantial compliance with the provisions of law, the following supposed irregularities are referred to:

1. It is said that "the tax deed recites that the sale was an adjourned sale, begun and held on the first Tuesday of May, A. D. 1863;" but the recitation in fact is: "Whereas, the treasurer of said county did, on the fifteenth day of May, A. D. 1863, by virtue of authority in him vested by law, at an adjourned sale begun and publicly held on the first Tuesday of May, A. D. 1863," etc. The words "of the sale" in the statutory form are omitted from the deed. Section 36, c. 197, Comp. Laws 1862, in force at the date of the tax sale, provides:

"The county treasurer shall, immediately after the day specified in the preceding section, make out a list of all the lands and town lots, describing such lands and town lots as the same are described on the tax-roll; with an accompanying notice, stating that so much of each tract of land or town lot described in said list, as may be necessary for that purpose, will, on the first Tuesday of May next thereafter, and the next succeeding days, be sold by him, at public auction, at some public place, naming the same, at the seat of justice of the county, for the taxes, penalty, and charges thereon."

And section 39 of said chapter 197 reads:

"On the day designated in the notice of sale the county treasurer shall commence the sale of those lands and town lots on which the taxes, penalty, and charges have not been paid; and shall continue the same from day to day (Sundays excepted) until so much of each parcel thereof shall be sold as shall be sufficient to pay the taxes, penalty, and charges thereon, including the cost of advertising and the fees for selling."

As a tax deed need not be in the exact form prescribed by the statute, but is good if it is substantially in the form prescribed, we do not think the omission of the words "of the sale" fatal. The recitation

in the deed clearly shows that the treasurer sold the lots on the fifteenth of May, 1863, and that such sale was an adjourned sale succeeding the first Tuesday of May, 1863. The tax sale must of necessity have been an adjourned sale of the sale begun on the first Tuesday of May, 1863.

2. The following words in the statutory form, "which was the least quantity bid for," are also omitted in the deed, but this omission is proper in every respect. The statute in 1863 required, as now, that if any land could not be sold for the amount of taxes and charges thereon it should be bid off by the county treasurer for the county for such amount. The county is not a voluntary or a competitive bidder, and therefore where a deed recites that no person offered to pay the taxes and charges, and the county treasurer bid the same off for the county for the amount thereof, it would be improper to recite in a tax deed based upon such a sale that the land bid off for the county "was the least quantity bid for." When the treasurer bids off property for the county the county takes the whole property. *Larkin v. Wilson*, 28 Kan. 513; *Magill v. Martin*, 14 Kan. 67.

3. Another objection to the deed is that it shows on its face that it was executed for a less consideration than the amount due. If this be true, the objection is without force, as it was disposed of in the case of *Bowman v. Cockrill*, 6 Kan. 311. We quote from that decision as follows:

"As to the second supposed irregularity in the tax deed, this court is of the opinion that the blank was not filled up with the proper amount, but that it should have been filled up with a much larger amount,—an amount equal to and including all the taxes, costs, and interest due on said lot at the time the deed was made and paid by the holder or holders of the tax-sale certificate upon which said tax deed was made; but still, we think it is immaterial whether that blank was filled with the right amount or with a less amount, as a less amount can do no one any possible injury, unless it is the grantee of the tax deed himself. It can certainly do no injury to the original owner of the lot."

In the case of *Noble v. Cain*, 22 Kan. 493, to which we are referred, the county commissioners, without any authority, made an order that Cain might purchase certain lots struck off to the county at a tax sale for want of bidders, for a sum of money less than the cost of redemption. We held that this order was void, and that the purchase by Cain thereunder equally void. This, and nothing more. We did not intend to overrule or modify *Bowman v. Cockrill*, *supra*. The tax deed, however, recites a sale to the county on May 15, 1863, and that the county clerk of Atchison county, on August 10, 1869, duly assigned the certificate of sale of the lots, and all the right, title, and interest of said county in and to the lots, to Mack. Within the case of *McCauslin v. McGuire*, 14 Kan. 234, upon such a recitation it will be presumed that the certificate was duly assigned, and that the assignee paid the amount required by law at the time of the assignment.

4. The tax deed is not void because it shows the two lots were assessed, sold, and deeded as one tract of land. *McQuesten v. Swope*, 12 Kan. 32; *Watkins v. Inge*, 24 Kan. 612; *Cartwright v. McFadden*, Id. 662.

5. From the attestation or conclusion of the deed, "by virtue of authority aforesaid" and "my official seal" are omitted. The attestation or conclusion is as follows:

"In witness whereof I, Chas. W. Rust, county clerk as aforesaid, have hereunto subscribed my name and affixed my official seal on this seventh day of December, 1869.

[Seal.]

"CHAS. W. RUST, County Clerk.

"Witnesses: WM. H. WILLIAMS.  
"D. E. MERWIN."

The statute provides that it shall be substantially in the form prescribed. The deed recites that the sale is made by Chas. W. Rust, county clerk of Atchison county, and is witnessed by Chas. W. Rust, as county clerk. As Chas. W. Rust signs the deed as county clerk, "my official seal" evidently refers to his official seal as county clerk, therefore "the official seal of said county." We do not think the omission of the words noted renders the deed void. *Haynes v. Heller*, 12 Kan. 381; *Morrill v. Douglass*, 14 Kan. 294; *Bowman v. Cockrill*, *supra*; *Geekie v. Kirby Carpenter Co.*, 1 Sup. Ct. Rep. 315; *Scheiber v. Kaehler*, 5 N. W. Rep. 817. See *Barr v. Randall*, *ante*, 515, just decided. The substance of the words "by virtue of authority aforesaid" is fully expressed in other recitations of the deed, when the whole deed is taken and considered together.

Several cases are referred to by counsel in Wisconsin and other states showing omissions in tax deeds which constituted, in those cases, fatal defects. So far as any of these decisions are in conflict with the prior adjudications of this court, we are not inclined to follow them. There is no doubt that the form of a tax deed prescribed by the statute must be substantially pursued or the deed will be invalid; but all the terms of the deed must be considered, and if everything substantially required by the statute as to form is found in the deed, the deed will be *prima facie* valid, although some immaterial words are omitted therefrom. There are no equities in this case in favor of the original owner, and if the tax deed is valid on its face, the statute of limitations having completely run in its favor, the deed becomes conclusive evidence of the regularity of the tax proceedings, and vests in the grantee an absolute estate in fee-simple of the lots therein described. The original owner seems to have abandoned these lots in 1862, and has never paid any taxes thereon since that time, —over 20 years,—and no legal steps were taken by such owner, or any person claiming under him, to regain possession of the lots until July 28, 1883. No taxes having been paid upon the lots for 1862, they were bid off by the county on May 15, 1863. On August 10, 1869, the county clerk of Atchison county assigned the certificate of

sale to Mack, and on December 7, 1869, the county clerk issued to him a tax deed. In 1862 the lots were assessed at \$20 each, and are now worth between \$600 and \$700 without any improvements on them. Mack took possession of the premises in the spring of 1870. During that year he built a house thereon, into which he moved with his family, and since that time has fenced the lots, and planted a great many trees on them. He has continued in the actual and peaceable possession of the lots ever since 1870, and has paid all the taxes assessed against the lots since 1862.

Upon the findings of fact of the trial court we are of the opinion its conclusions of law that the tax deed is not in substantial compliance with the provisions of the statute, and that the original owner of the real estate is not barred by the statute of limitations, are erroneous. Therefore, upon the findings of fact, Mack is entitled to judgment.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

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(35 Kan. 180)

SARBACH v. NEWELL and another.

Filed April 9, 1886.

1. PARTITION—COSTS—ATTORNEYS' FEES—EXPENSES.

The plaintiff owned two-elevenths of a certain city lot, not including the enhanced value of the lot by reason of a building thereon, and the defendants owned the other nine-elevenths of the lot, and were also entitled to the enhanced value thereof by reason of said building. The plaintiff's interest in the entire property with respect to the defendants' interest was as 48 is to 997. *Held*, in an action for partition, that, under section 628 of the Civil Code, the costs, attorneys' fees, and expenses should be apportioned between the parties according to their respective interests in the entire property.

2. SAME—DISPOSITION OF PROCEEDS OF SALE.

In such action, where the property could not be partitioned without manifest injury thereto, but was sold, *held*, in pursuance of the foregoing statute, and the decision of the supreme court formerly made in the case, (*Sarbach v. Newell*, 30 Kan. 102, 104; S. C. 1 Pac. Rep. 30,) that out of the proceeds of the sale the costs, attorneys' fees, and expenses should first be paid, and then that the remainder of the proceeds should be divided between the parties according to their respective interests in the property.

Error from Jackson county.

*Lowell & Walker and Hayden & Hayden*, for plaintiff in error.

*W. S. Hoaglin*, for defendants in error.

VALENTINE, J. This was an action brought by Louis Sarbach against Mary Newell and Samuel H. Newell, to have certain real estate situated in the city of Holton, Jackson county, Kansas, partitioned between them. On June 16, 1882, judgment was rendered in the case partitioning the property, as follows:

"To the plaintiff, two-elevenths part of said premises, without the stone store building thereon, if the same can be done without manifest injury; but if  
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such partition cannot be made without manifest injury, then that said commissioners shall appraise the value of said lot without the said stone store building, and make a report of their proceedings to the court forthwith. It is further decreed that in case the plaintiff shall elect to take the property he shall pay the found value of said stone store building, nine-elevenths (9-11) of the appraised value of the lot, and his proportionate share of the costs and attorneys' fees to be taxed; and in case the defendants shall elect to take the property at its appraised value, they shall pay two-elevenths of the appraised value of the lot, and nine-elevenths of the costs and attorneys' fees herein to be taxed. It is further adjudged and decreed that in case of a sale of said property the proceeds arising from such sale shall be applied as follows, to-wit: (1) In payment of the costs of this proceeding, including attorneys' fees hereafter to be ascertained and taxed; (2) that said defendants be paid that proportion of the residue which the found value of said stone store building shall bear to the appraised value of the lot, and the balance then remaining shall be divided as follows: two-elevenths (2-11) to the plaintiff and nine-elevenths to the said Mary Newell."

At the July term of the supreme court in 1882 this judgment was affirmed. *Sarbach v. Newell*, 28 Kan. 642. Afterwards, and at the January term of the supreme court in 1883, on a motion for a rehearing, the judgment of the district court was modified by an order of the supreme court, as follows:

"The order of the district court directing the commissioners making partition to set off to the plaintiff the two-elevenths part of the premises without the stone store building thereon, if the same can be done without manifest injury, must be affirmed. But if partition cannot be made without manifest injury, the commissioners must appraise the value of the lot without the stone store building, and also the value of the lot with all the improvements thereon. The difference between the value of the lot without the stone store building and the value of the lot as improved will be the amount which the improvements add to the value of the premises, or, in other words, will be the enhanced value of the property resulting from the improvements erected thereon. The proceeds of the sale of the premises must be applied as follows: *First*, the costs as adjudged by the district court; *second*, the said defendants shall receive that proportion of the residue which the enhanced value of the premises resulting from the improvements shall bear to the appraised value of the lot; and the remainder of the proceeds shall be divided as decreed by the district court. As the taxes on the vacant lot have equaled the annual net value of the rents, issues, and profits thereof, and as the taxes have been paid by the defendants, the plaintiff is not entitled to recover any sum for rents, issues, or profits, or any damage for the withholding of the premises." *Sarbach v. Newell*, 30 Kan. 102, 104; S. C. 1 Pac. Rep. 30.

Afterwards the commissioners appointed to partition the property examined the same, and reported to the district court that the same could not be partitioned without manifest injury; and they also appraised the lot without the stone store building at \$1,200, and the lot with all the improvements thereon at \$4,750. The report of the commissioners was filed in the district court on February 29, 1884. Afterwards, and on March 21, 1884, the case came on for further hearing in the district court, when the following proceedings were had, to-wit:

"And thereupon and then and there the defendants offer to take the said property at the appraisers' value; and then and there the plaintiff offers to take the same at the appraised value; and thereupon the defendants, in open court, withdrew their offer; and then and there the plaintiff withdrew his offer; and then and there the defendants offered again to take the said property at the appraised value; and thereupon the plaintiff offered to take the said property at its appraised value, and asked for an order of sale; and thereupon it is ordered and adjudged by the court that the sheriff of Jackson county proceed to advertise and sell said property," etc.

On May 31, 1884, the sheriff sold the property to Samuel H. Newell, for \$4,500. On June 21, 1884, on motion of the defendants, the sale was confirmed; and thereupon the court ordered the proceeds thereof to be distributed as follows:

"To the defendants herein their share, as and for the stone store building, the sum of \$3,363.15, and that, from the balance, the proportional share which said lot brought at said sale, \$1,136.85, be paid: *First*, the costs, including attorneys' fees, \$225, (one-half to be paid to plaintiff's attorneys and one-half to defendants' attorneys,) and the balance to be paid, two-elevenths (2-11) to the plaintiff, and to the defendants nine-elevenths (9-11) of the residue of said proceeds or share."

Of this order of distribution the plaintiff complains, and brings the case to this court for review. He claims that the costs, attorneys' fees, and expenses should be first paid out of the entire proceeds of the sale of the property; and then that the remainder of the proceeds should be divided between the plaintiff and the defendants in proportion to their respective interests in the property; while the court, in effect, ordered that the defendants should be first paid their share resulting from the enhanced value of the property by reason of the stone store building, without such share being subject to the payment of any of the costs, attorneys' fees, or expenses accruing in the litigation; and then that the costs, attorneys' fees, and expenses of the litigation should be paid from the remainder of the proceeds. In other words, the plaintiff claims that the costs, attorneys' fees, and expenses should be first paid; and then that as the value of the lot without the stone store building was 1200-4750, or 24-95 of the entire value of the property; and that as the enhanced value of the lot resulting from the stone store building was 3550-4750, or 71-95 of the entire value of the property; and that as he owned 2-11 of the lot,—he should receive 2-11 of 24-95, or 48-1045 of the remainder of the proceeds; and that the defendants, who owned 9-11 of the lot, and were entitled to all the enhanced value resulting from the stone store building, should receive 9-11 of 24-95, and 71-95, or 997-1045, of the remainder of the proceeds; or, in other words, that the amount which the plaintiff and defendants should receive respectively, after the costs, attorneys' fees, and expenses were paid, should be as 48 is to 997. Under this view the plaintiff claims that he should pay only 48-1045, or less than 1-21 of the costs, attorneys' fees, and expenses, while under the order of the court below he is required to pay

2-11 of the same. The statute relating to costs in actions for partition reads as follows:

Sec. 628. The court making partition shall tax the costs, attorneys' fees, and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefor, as in other cases." Civil Code, § 628.

We think the claim of the plaintiff is substantially correct, both under the statute and under the order of the supreme court made at its January term, 1883. *Sarbach v. Newell*, 30 Kan. 104; S. C. 1 Pac. Rep. 30. The costs, attorneys' fees, and expenses should first be paid out of the entire proceeds of the sale of the property, and then the parties should receive their respective shares out of the remainder of the proceeds. By such a distribution and apportionment the costs, attorneys' fees, and expenses, as well as the amounts to be paid to the parties, would be apportioned "among the parties according to their respective interests."

The order of apportionment made by the court below on June 21, 1884, will be reversed, and cause remanded for further proceedings. (All the justices concurring.)

(35 Kan. 196)

#### DAVIS v. HARRINGTON.

Filed April 9, 1886.

##### 1. TAXATION—TAX DEED—VALIDITY—RECITALS.

Where a tax deed follows the statutory form, and states that the land was sold by the county treasurer at a sale begun and publicly held "at the county-seat of said county," and does not state that the land was sold "at public auction at his office," but the sale was in fact at public auction at the treasurer's office, *held*, that the tax deed, unless void for some other reason, is sufficient.

##### 2. SAME—TAX SALE—COMBINATION AMONG BIDDERS.

Where the bidders at a tax sale do not bid against each other, but still there was no agreement or understanding between them that would prevent competition or bidding by any person who desired to bid, *held*, that the sale is not void because of any unlawful combination among the bidders.

##### 3. SAME—NOTICE OF SALE.

Where notice of the sale was properly given and proper proof thereof made, and the notice and proof were properly filed as required by law, but such notice and proof were afterwards lost or destroyed, and were not on file in the proper office, *held*, that such loss or destruction does not render the tax sale void.

##### 4. SAME—TAX DEED—CONSIDERATION—MISTAKE.

Where the county clerk, in executing a tax deed, inserts as the consideration for the deed the amount of the taxes paid by the holder of the tax title and his assignor, without adding any interest or costs, as he should do; and such error is shown by the tax deed itself; and the redemption notice showed "the amount of taxes charged, and interest calculated to the last day of redemption," which of course was a larger amount than the amount inserted in the tax deed as the consideration therefor: *held*, that such error of the county clerk with respect to the amount of the consideration for the tax deed does not render the tax deed void.

Error from Saline county.

*John H. Muhan and W. W. Guthrie*, for plaintiff in error.

*Garver & Bond*, for defendant in error.

VALENTINE, J. This was an action brought by Leander Davis, in April, 1884, against Patrick Harrington, to have certain tax titles set aside and held for naught. It appears from the record, among other things, as follows: The plaintiff, through proper conveyances, holds the original patent title to the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$ , of section 8, in township 13 S., of range 1 W. of the sixth principal meridian, in Saline county, Kansas. The defendant, through proper conveyances, holds title to the property under two tax deeds, one on the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , and the other on the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , of said section of land, both tax deeds having been executed on September 10, 1883, upon tax sales made on September 7, 1880, for taxes levied upon the land for the year 1879, which tax deeds were recorded on September 11, 1883. The defendant is in the possession of the property. The case was tried on December 19, 1884, before the court without a jury, and the court took the case under advisement until January 8, 1885, when it made a general finding in favor of the defendant, and against the plaintiff, and rendered judgment accordingly, and to reverse this judgment the plaintiff brings the case to this court.

In this court the plaintiff makes the following points: (1) The tax deed for the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of said section is void because it recites that the land was taxable for the year 1879, and was sold in 1879. (2) The tax deed for the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of said section is void because it recites that the land was sold at a sale begun and publicly held "at the county-seat of said county." (3) The sale itself was void because of an unlawful combination among the bidders. (4) The sale was also void for the reason that there was no record evidence of any notice of the sale on file. (5) The tax deeds are void for the further reason that the recitals in each of them show that the amount required for the final redemption of the land from the taxes was a less amount than the final redemption notice to the owner of the land showed the same to be.

By agreement of the parties the record was so amended as to take the plaintiff's first point out of the case.

The second point made by the plaintiff is that the tax deeds showed that the land was sold by the county treasurer of Saline county "at the county-seat of said county," and did not state or show that the same was sold by him "at public auction at his office." In this respect the tax deeds followed the form given by the statute, and there was not the slightest necessity to deviate from that form in order to make them speak the truth; and hence, in this respect, we think the tax deeds were sufficient. *Hobson v. Dutton*, 9 Kan. 477, 486. The sale was in fact made at public auction, and at the treasurer's office.

The third point made by the plaintiff is that there was an unlawful combination among the bidders at the tax sale. Now, nearly all

the evidence, including the evidence of several witnesses, was against this claim of the plaintiff, and the court below found generally in favor of the defendant and against the plaintiff, and therefore found that there was no such unlawful combination. Several witnesses, including the purchasers of the property in controversy at the tax sale in question, testified positively that there was no combination, nor any agreement or understanding, between the bidders that would prevent competition or bidding by any person who desired to bid, and nothing that would render the sale in the least unfair. There was evidence, however, which tended to show that the bidders did not in fact compete with each other for the purchase of the land; and this resulted principally from the fact that no bidder wanted to purchase the land unless he could get the whole of it for the taxes due thereon. Some of the bidders were speculators, some of them were mortgagees who wished to protect their mortgage liens, and others, probably, bid for other reasons. This case, we think, comes within the decision in the case of *Beeson v. Johns*, 59 Iowa, 166, 169; S. C. 13 N. W. Rep. 97. In that case the court used the following language:

"There were three bidders at the tax sale, and they did not bid against each other, and this constitutes the only evidence there was of a fraudulent combination. We feel constrained to say this evidence is not, in our opinion, sufficient. Fraud cannot be presumed, but the contrary presumption must be indulged in, in the absence of evidence. It might well be that each bidder obtained all the land he wanted without the necessity of bidding against any one else."

The plaintiff also claims that the tax sale was void for the reason that there was no record evidence of any notice of the sale on file. Now, the tax deeds themselves are *prima facie* evidence that all things necessary to the validity of the tax deeds were done; and, besides, there was ample evidence introduced on the trial to show that such notice was given, that proper proof thereof was made, and that the notice and proof were properly filed as required by law. Afterwards, however, such notice and proof were lost or destroyed, and another notice, with proper proof thereof, was substituted therefor. This, we think, was sufficient. The loss or destruction of the notice and proof first filed does not render the tax sale void, nor the tax deed void, nor does the fact that the notice and proof were at one time lost or destroyed, and not on file in the proper office, render any of such tax proceedings void. *Watkins v. Inge*, 24 Kan. 612, 616. And, further, it will always be presumed, in the absence of anything to the contrary, that public officers do their duty as required by law. *Young v. Rheinecker*, 25 Kan. 367, 368; *Mix v. People*, 81 Ill. 118.

The last objection urged by the plaintiff against the tax deeds is that their recitals show that the amount required for the final redemption of the land from the taxes was a less amount than the final redemption notice to the owner of the land showed the same to be. Or, in other words, the tax deeds show conclusively what the amount re-

quired for the final redemption of the land was, and the redemption notice required a larger amount, and therefore required too much. Now, we do not think that the tax deeds show any such thing. On the contrary, we think they tend to show the reverse. The tax deeds show the amount of the taxes which the holder of the tax titles and his assignor actually paid upon the land; but they do not show the amount which it would take to redeem the land from the taxes at the time when the tax deeds first became due, or, in the language of the statute, "the amount of taxes charged, and interest calculated to the last day of redemption;" but such amount might, with some degree of accuracy, be calculated from the amounts which the tax deeds show was actually paid by the holder of the tax deeds and his assignor. If the times of such payments were shown by the tax deeds, the amount could be calculated with absolute certainty; but the times of such payments are not shown. The county clerk, however, when he executed the tax deeds, inserted in each tax deed as the consideration therefor the aggregate amount of the taxes paid by the purchaser of each 80-acre tract of land, *without adding any of the costs or interest due thereon*. Of course, this aggregate amount of taxes paid, *without interest or costs*, would not be equal to the amount which it would take to redeem the land from the taxes on the last day of redemption, and at the time when the tax deeds became due on the land, which *includes all taxes, interest, and costs*. But this failure on the part of the county clerk to state, as the consideration for each of the tax deeds, the amount of the taxes paid, *with interest and costs*, as we think he should do, does not vitiate the tax deeds. This has been expressly decided in the case of *Bowman v. Cockrill*, 6 Kan. 325, where it is held that the filling of the blank (designated in the statutory form as the place for the statement of the consideration of a tax deed) with an amount less than it should be does not render a tax deed void. We presume the redemption notice was absolutely correct. There is no showing to the contrary.

The judgment of the court below will be affirmed.

(All the justices concurring.)

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(35 Kan. 150)

STATE *ex rel.* BRADFORD, Atty. Gen., etc., *v.* LIPPERT and others, Co. Com'rs, etc.

Filed April 9, 1886.

1. INJUNCTION—NOTICE—BOND.

Where an injunction is granted at the commencement of an action by a district judge, without notice or appearance by the defendants, and no undertaking is furnished by the plaintiff, and no summons is issued, but the district clerk issues an alleged order of injunction forbidding the defendants from doing certain acts not recited or referred to in the petition, *held*, such order has no operation, and is wholly void, and may be disregarded by any one.

2. MUNICIPAL CORPORATIONS — TOWNSHIP SUBSCRIPTION — STOCK OF RAILROAD COMPANY.

Where a petition is properly presented to the board of county commissioners of a county, under the provisions of chapter 107, Sess. Laws 1876, and the

amendments thereto, to submit to the qualified voters of a township a proposition to subscribe to the capital stock of a railroad company proposing to construct a railroad through or into the township, and upon being examined and canvassed by the county commissioners is found to contain the requisite number of legal petitioners, it is the duty of the commissioners to cause an election to be held, as prayed for, to determine whether such subscription shall be made.

8. SAME—BONDS—LAWS 1870, CH. 90.

Chapter 90, Sess. Laws 1870, does not control or limit the amount of bonds to be voted for under elections granted in accordance with the provisions of chapter 107, Sess. Laws 1876, and the amendments thereto.

Original proceedings in *mandamus*.

On January 2, 1886, the state of Kansas, on the relation of the Walnut Valley & Colorado Railroad Company, filed their petition in this court against A. C. Lippert, J. R. Stock, and J. E. Ruhl, as the board of county commissioners of Rush county, praying that a writ of *mandamus* be awarded against the defendants, as the board of county commissioners, to convene and proceed to call elections in the townships of Garfield, Banner, Center, Union, and Belle Prairie, Rush county, and to submit at said elections propositions to subscribe to the capital stock of the Walnut Valley & Colorado Railroad Company, in accordance with the terms and provisions of the petitions presented to said board of county commissioners. Subsequently, with leave of the court, the state of Kansas, on the relation of S. B. Bradford, attorney general of the state of Kansas, was substituted as plaintiff for the Walnut Valley & Colorado Railroad Company.

The facts stated as constituting grounds for the writ are substantially as follows: That the Walnut Valley & Colorado Railroad Company is a corporation, created and existing under the laws of the state to construct, operate, and maintain a line of railroad into and through the townships of Garfield, Banner, Center, Union, and Belle Prairie, in the county of Rush; that in order to enable the company to construct, equip, and operate its line of road, it is desirous of procuring from said townships subscriptions to its capital stock, to be paid for by the issuance of the bonds of the townships; that on December 16, 1885, said railroad company presented to the board of county commissioners of Rush county petitions praying that an election be called to submit to the qualified electors of each of said townships propositions to subscribe to the capital stock of said railroad company, and issue the bonds of said townships in payment therefor, in the following amounts, to-wit: in Garfield township, \$17,500; Banner township, \$17,500; Center township, \$18,500; Union township, \$17,000; and Belle Prairie township, \$16,500; that the assessed valuation of the property in each of said townships is sufficient to authorize each township to vote the amount of aid to the railroad company requested in each of the said several petitions; that the petitions so presented to the board of county commissioners of Rush county each contained the signatures of more than two-fifths of the resident tax-payers of said townships; that this fact was ascertained

and decided by the board of county commissioners in their canvass of the petitions; that it was the duty of the board of county commissioners, upon the presentation of said petitions, to call the elections in each of said townships, as prayed for, and to direct the sheriff to make the necessary proclamations thereof, to the end that the propositions might be submitted to the legal voters of said townships; that the defendants, acting as such board of county commissioners, wholly disregarded their duty in the premises, and failed and refused to call said elections, or any of them, in any of said townships; that after the board of county commissioners refused to call said elections, for the purpose of procuring some excuse therefor, by collusion with one D. A. Stubbs, they procured said Stubbs to file in the district court of Rush county a petition praying for an injunction to restrain them from calling the elections; that no legal order of injunction was ever issued in the case, yet the defendants pretended that they were prevented and prohibited from calling the elections, or any of them, by reason of said proceedings; that the several petitions to the board of county commissioners as aforesaid were presented under the provisions of an act of the legislature of the state of Kansas entitled "An act to enable counties, townships, and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874," which took effect February 26, 1876, and the amendments thereto.

On January 2, 1886, an alternative writ of *mandamus* was allowed and issued upon the foregoing petition of plaintiff, and on February 24, 1886, the defendants filed their return and answer thereto. The following allegations, among others, are contained therein:

"That under the limitations provided in chapter 107, Laws 1876, to-wit, 'that no township shall be allowed to issue, under the provisions of this act, more than fifteen thousand dollars, and five per cent. additional of the assessed value of the property of such township,' the said several townships would be authorized to issue bonds not exceeding the following amounts, to-wit: Garfield township, seventeen thousand seven hundred and ninety-nine dollars, (\$17,799;) Banner township, seventeen thousand five hundred and eighty-six dollars, (\$17,586;) Center township, eighteen thousand nine hundred and three dollars, (\$18,903;) Union township, seventeen thousand four hundred and sixty-six dollars, (\$17,466;) Bell Prairie township, sixteen thousand nine hundred and thirty-five dollars, (\$16,935.) That under the limitations provided in chapter 90, Laws 1870, to-wit, 'that the amount of bonds voted by any township shall not be above such amount as will require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued,' the said several townships would be authorized to issue bonds bearing six per cent. interest annually, [the interest stated and prescribed in the propositions and petitions presented to said board by said railroad company and the petitioners,] not exceeding the following amounts, to-wit: Garfield township, nine thousand one hundred and ninety-seven dollars, (\$9,197;) Banner township, eight thousand six hundred and twenty-one dollars, (\$8,621;) Center township, thirteen thousand and eleven dollars, (\$13,011;) Union township, eight thousand two hundred and twenty-two dollars, (\$8,222;) Belle Prairie township, six thousand four hundred and fifty-two dollars, (\$6,452.) That the defend-

ants have only refused to call the elections upon the said several petitions because of their doubt as to their authority so to do; that on December 29, 1885, they and each of them were enjoined from calling any of said elections in an action then pending, wherein the state of Kansas, upon the relation of D. A. Stubbs, was plaintiff, and said board of county commissioners were defendants; that the injunction suit has never been discharged or dismissed; and that the said action still remains pending and undetermined in the district court of Rush county."

*James Hagerman, S. I. Hale, and H. Fierce, for plaintiff.*

*Hargrave & McCormick and E. A. Austin, for defendant.*

HORTON, C. J. This is an action brought in this court by the plaintiff against the defendants to compel the defendants to call an election to vote on the question of subscribing stock and issuing bonds to aid the Walnut Valley & Colorado Railroad Company to construct a line of road in and through the following townships of Rush county: Garfield, Banner, Center, Union, and Belle Prairie. It is admitted that the petition was properly presented, duly canvassed, and found to contain the requisite number of legal petitioners. The defendants answer that they are willing to order the elections requested whenever they have the right so to do, but are prevented by an injunction issued out of the district court of Rush county, on December 29, 1885, in an action therein pending between the state of Kansas, on the relation of D. A. Stubbs, against the board of county commissioners of Rush county, and the limitations embraced in chapter 90, Sess. Laws 1870, being an act to enable municipal townships to subscribe for stock in any railroad. It was clearly apparent to us, upon the hearing of this case, that said action is a collusive one, and that the defendants could have had the injunction dissolved at any time upon making proper application therefor. The petition is very defective, perhaps fatally so. It does not allege when the election is to be held, in what portion of the county, or in what townships, nor does it name any railroad company to whom the subscription is to be made. It does not name in any way the townships referred to in the alternative writ, nor that there is more than one township, and its averment in that respect is: "An election is to be ordered in a portion of the county to vote bonds to a branch of the A., T. & S. F. R. R. Co." This petition was presented to the district judge of Rush county on December 28, 1885, and without notice to defendants, or appearance by them, he indorsed on the petition:

"Temporary injunction allowed upon the execution of a bond to the defendants in the sum of one thousand dollars, to be approved by the clerk of the district court of Rush county, Kansas. J. C. STRANG, Judge."

No summons was issued prior to the commencement of this proceeding. Instead of issuing a summons, and having the district clerk indorse thereon "Injunction Allowed," as required by the statute, the clerk issued the order of injunction. This order attempts to forbid the commissioners of Rush county from calling elections in said town-

ships of Garfield, Banner, Center, Union, and Belle Prairie, but is wholly unauthorized and void, because it is not issued in conformity with the petition or the order of the district judge. It names townships and a railroad corporation not mentioned in the petition; and, further, said order of injunction, even if properly issued, is no obstacle to the granting of the elections, because the statute provides that an injunction shall not operate until the party obtaining the same shall furnish an undertaking, executed by one or more sufficient sureties. No proper injunction undertaking was given prior to the commencement of this action. All proceedings had in the case pending in the district court of Rush county subsequent to January 6, 1886, the date of the service of the alternative writ of *mandamus*, cannot prejudice the rights of plaintiff.

The other objection to ordering the elections in the several townships is also without any force. The petition was presented under and in accordance with the provisions of an act of the legislature of the state of Kansas, of February 29, 1876, entitled "An act to enable counties, townships, and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874," and the amendments thereto. The law is the latest expression of the legislature, and the limitations in chapter 90, Laws 1870, cannot apply, or control the amount of bonds to be voted for under the elections prayed for.

It is not necessary to decide whether chapter 90, Sess. Laws 1870, has any operation at this time, or whether it is wholly repealed. It is sufficient for this case to say that the petitions presented to the defendants comply, in all respects, with the provisions of chapter 107, Sess. Laws 1876, and the amendments thereto, and that, under the statute, it is clearly the duty of the commissioners of Rush county to call the elections demanded.

Let a peremptory writ of *mandamus* issue against the defendants.  
(All the justices concurring.)

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(35 Kan. 99)

*In re* EDWARDS.

Filed April 9, 1886.

1. CRIMINAL LAW—TRIAL—FAILURE TO BRING PRISONER TO TRIAL—DISCHARGE.

Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for discharge, made by him under the terms of section 221 of the Criminal Code, and instead thereof remands him to jail until bail is given, the order of the court cannot be reviewed or reversed, or the prisoner discharged, by a proceeding in *habeas corpus* before the supreme court.

2. SAME—CHANGE OF VENUE.

Where an information was filed against E. for the offense of murder, one day prior to the commencement of the regular term of the district court for 1885, and at such May term of the court, against the objection of the state and the defendant, the court attempted to remove the case for trial to another county, in another judicial district, upon the ground that the judge was disqualified to preside on account of his prejudice; and such defendant was held

to answer on bail to the district court of such other county; and thereafter the September and November terms of the district court where the information was filed were held without the defendant being tried, and in December the jury were discharged, in his absence, but while his attorneys were present, who refused to appear or answer in any way for him; and the defendant did not, at any one of the terms of said court, ask or announce himself ready for trial, but made application on the last day of the November term of the court for his discharge, because he had not been brought to trial within the time limited in section 221 of the Criminal Code: *held*, that the court committed no error in denying the motion, as the state announced itself ready to proceed at once with the trial, and the court decided that there was not time, during the balance of the term of court, for the trial of the case upon its merits.

Original proceedings in *habeas corpus*.

A petition was filed in this court on February 9, 1886, on behalf of William T. Edwards for a writ of *habeas corpus*, who is charged with murder in the first degree in killing one John Wilson on December 6, 1884. The petition, among other things, shows that on January 2, 1886, the petitioner made a written application to the district court of Sumner county, verified by his oath, to be discharged from custody, and therein alleged, among other things, that the information charging him with the offense of murder in the first degree was filed in the district court of that county on May 4, 1885, one day prior to the commencement of the regular May term for 1885 of that court; that said May term was finally adjourned on August 17, 1885, without the petitioner having been brought to trial, and without his having made application for, or having consented to, a continuance of the action; that the next regular term of that court commenced on September 1, 1885, and was finally adjourned on October 3, 1885, without the petitioner having been brought to trial, and without his having applied for or consented to a continuance; that the next and third regular term of that court after the filing of the information commenced on November 3, 1885, and continued for the transaction of business up to and inclusive of December 12, 1885, when the court was adjourned to January 2, 1886, (the regular December term of the district court of Comanche county having intervened, the same commencing on December 15, 1885, and ending during the same month,) without the petitioner having been brought to trial, and without his having applied for or consented to any continuance. Said application further alleged that from and after the commencement of the regular November term of the district court of Sumner county for 1885, up to and including the date of its adjournment on December 12, 1885, the court had ample time to have fully tried said cause, and that the court actually had ample time to have done so between November 3, 1885, and December 12, 1885 as shown by the journal and records thereof.

Upon the hearing of the application for discharge, the court made the following findings of fact:

"That the state of Kansas, by its said attorneys, has on this day, and since the filing and presentation of said application of said defendant for the con-

sideration thereof by the court, here announced itself ready to proceed with the trial of said cause upon its merits; but the court further finds that there is not now time, during the period allowed by law, for the trial of said cause upon its merits at the present term, owing to the fact that this is the last day of the week, commonly called Saturday, and that on the next ensuing Tuesday, to-wit, the fifth day of January, A. D. 1886, the district court of Harper county, in the same, the Nineteenth, judicial district, in the state of Kansas, is required by law to convene in regular term; and, further, that the regular panel of the jury for this term of this court were each and all, on the twelfth day of December, A. D. 1885, excused and discharged (but without the consent or objection of said defendant, he not being present, either in person or by attorney, but then being on bail to appear before the district court of Cowley county, Kansas, on the first day of the regular December, A. D. 1885, term thereof, to answer the charge contained in and by the information filed in this action against him, which had prior thereto, and over and against the protest and objections of said defendant, been erroneously, by this court, of its own motion, attempted to be transferred to said last-named court for trial) from further attendance upon this court for this term; and owing to the further fact that no witnesses have been subpoenaed on behalf of the state to appear and testify at this term in this cause; and the court further finds that on the twelfth day of December, 1885, at the present term of this court, the state of Kansas, by its attorney, John A. Murray, county attorney of said Sumner county, filed its motion to have the order of this court changing, or attempting to change, the venue for the trial of this action to the district court of Cowley county, in the Thirteenth judicial district, in the state of Kansas, vacated and set aside, to the end that said cause might be remanded to this court for trial, in accordance with the law of the land; and that pending the hearing of said motion, the defendant not being personally present in court, the attorneys who had theretofore appeared for said defendant, and who now appear for him in this court, Messrs. Herrick, George & King and McDonald & Parker, each and all being personally present, were, each and all, specifically interrogated touching the matter, by the court, and said attorneys, each and all, answered that they did not, nor either or any of them, then appear in this court for or on behalf of said defendant for any purpose whatsoever."

Thereon the court found that the petitioner was not legally entitled to be discharged as by him demanded. The court further ordered the case to be continued for trial at the next regular term of court, and that the petitioner be required to enter into bail in the sum of \$7,000 for his appearance at said term of the district court to answer the charge alleged against him. Thereupon the petitioner objected and excepted. On March 3, 1886, the sheriff of Sumner county made return to the writ of *habeas corpus* issued that he restrained the petitioner of his liberty, and retained him in custody, by virtue of a warrant issued out of the district court of Sumner county upon the information filed in that court on May 4, 1885, charging the petitioner with murder in the first degree.

*W. A. McDonald and George & King*, for petitioner.

*John A. Murray*, for respondent.

HORTON, C. J. The petitioner claims that he is entitled to his discharge under the provisions of section 221 of the Criminal Code, which reads:

"If any person, under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term."

We do not think the proceeding by *habeas corpus* the proper remedy in this case. The petitioner alleges that the district court refused his application to be discharged under the provisions of section 221 of the Criminal Code, and remanded him to custody until he should give bail, and continued the cause for trial. The order of the district court, until reversed, is valid and sufficient authority for the retention of the petitioner in custody. We cannot, in a proceeding of this character, review or reverse an order or judgment of the district court, having jurisdiction, when such order is neither void, nor in excess of its authority. Section 671, Civil Code; *Ex parte McGehan*, 22 Ohio St. 442. The statutes construed in the cases of *Brooks v. People*, 88 Ill. 327, and *In re Garvey*, 4 Pac. Rep. 758, do not provide for any discharge of the offense, but operate merely to set the prisoner at liberty. In this state, the statute provides for the absolute discharge of the prisoner from the offense, and therefore Illinois and Colorado decisions are not applicable. In the case of *In re Dill*, 32 Kan. 668, S. C. 5 Pac. Rep. 39, the petitioner was guilty of no offense, and the judgment rendered against him was void. In that case he was released from imprisonment upon that ground. But, waiving the irregularity of this proceeding, we think the ruling of the district court was correct. The information was filed against the petitioner one day prior to the commencement of the May term of the district court of Sumner county for 1885. At the May term, against the objection of the state and the petitioner, the court attempted to remove the case for trial to Cowley county, in another judicial district, upon the ground that the judge was disqualified to preside at the trial on account of his prejudice. This order was vacated, upon the motion of the county attorney of Sumner county, on December 12, 1885. The regular terms of the district court of Sumner county for 1885 were held as follows: The first Tuesdays of May, September, and November. On account of the intervention of the district court of Comanche county, the November term of the district court of Sumner county was adjourned from December 12, 1885, to January 2, 1886, at which time the application for the discharge of this petitioner was presented. After the presentation of such application, the state announced itself ready to proceed at once with the trial. The court, however, in its findings of fact, states that there was not time during the period allowed by law for the holding of the November term of court for the trial of the case upon its merits. The state was not responsible for the discharge of the jury or the adjournment of the court on December 12, 1885, and we must assume that when it announced itself

ready for trial on January 2d, whether any witnesses had been subpoenaed or not in behalf of the state, it was capable of producing them, if allowed so to do. The statute expressly provides that if the delay to bring a prisoner to trial be occasioned by the want of time to try his cause, the court is not bound to discharge him. See, also, section 222, Crim. Code. In several states, as above referred to, similar statutes to ours operate merely to set the prisoner at liberty; but our statute provides, in effect, an acquittal, if the defendant is not brought to trial within the time therein prescribed. Therefore there is good reason for holding that a prisoner ought not to be entitled to his discharge unless he brings himself within the spirit of the statute. The section quoted was designed to shield the innocent from oppression, but not to enable the guilty to escape. *Stewart v. State*, 13 Ark. 720.

In *Clark v. Com.*, 29 Pa. St. 129, it was decided, concerning a similar statute, that "it was made to restrain the malice and oppression of prosecutors, and to relieve wrongful imprisonment; not to embarrass the administration of criminal law; not to relieve righteous imprisonment, and to defeat public justice."

In *Stewart v. State*, *supra*, the court construed a similar statute to mean that the prisoner was entitled to his discharge only where the delay of the state in bringing him to trial was for want of evidence, and that, within the spirit of the law, the prisoner, to be entitled to his discharge for want of prosecution, must place himself on the record in the attitude of demanding a trial, or at least of resisting postponement.

On December 12, 1885, when the jury were discharged, the petitioner was not present, being on bail to appear before the district court of Cowley county, but his attorneys were all in the court, and when specifically interrogated concerning the case by the court, refused to appear or answer in any way for their client. During the several terms of the district court of Sumner county, held since the filing of the information, the petitioner has not announced himself ready for trial at any of the terms thereof. He has not seemed anxious for any hearing of the case against him upon its merits, but has only desired a discharge without any trial.

The petitioner will be remanded.

(All the justices concurring.)

(35 Kan. 105)

## STATE v. EDWARDS.

Filed April 9, 1886.

## 1. CRIMINAL LAW—APPEAL—WHEN TAKEN.

An appeal in a criminal action can be taken by a defendant only after judgment, and an intermediate order of which he complains can be reviewed only on such an appeal. *Cummings v. State*, 4 Kan. 225; *State v. Freeland*, 16 Kan. 9.

## 2. SAME—ORDER REFUSING DISCHARGE, NOT APPEALABLE.

An appeal will not lie from an order of the district court refusing an application of a defendant charged with a criminal offense for his discharge under the provisions of section 221 of the Criminal Code, where the court remands the defendant into custody until he gives bail, and continues the case against him for trial at the next regular term. *State v. Horneman*, 16 Kan. 452.

Appeal from Sumner county.

S. B. Bradford, Atty. Gen., and John A. Murray, for appellee.

McDonald & Parker and George & King, for appellant.

HORTON, C. J. The complaint in this case is that the district court erred in refusing to discharge the defendant under the provisions of section 221 of the Criminal Code. Instead of granting the application made, the court remanded the defendant to custody until he should give bail, and ordered the case to be continued for trial at the next regular term. Therefore the cause is still pending. A defendant in a criminal case can only appeal after judgment against him,—that is, after final judgment,—and intermediate orders can be reviewed only on such an appeal. The order refusing a discharge is not a final judgment. The appeal is premature, and must be dismissed. Sections 281, 282, Crim. Code; *Cummings v. State*, 4 Kan. 225; *State v. Freeland*, 16 Kan. 9; *State v. Horneman*, Id. 452. If we were to pass, however, upon the merits of the case, under the authority of *In re Edwards*, ante, 539, the order of the district court would have to be affirmed.

(All the justices concurring.)

(35 Kan. 202)

## HAZELTINE v. EDMAND.

Filed April 9, 1886.

## 1. NEGLIGENCE—WATER DROPPING FROM EAVES ON ADJOINING PROPERTY.

Where two buildings are situated near each other upon lots adjacent, and the eaves of one come within a few inches of the side or wall of the other, and the owner of such building has no eaves-trough, gutter, or other conductor for carrying off the rain or water falling upon his building, *held*, that an action will lie against him for any damage to the adjoining building, or its contents, caused by the water falling on the roof, and discharged against the wall of such adjoining building, on account of the absence of the proper eaves-trough, gutter, or other conductor to carry off such water.

## 2. SAME—DUTY OF OWNER OF BUILDING.

Where the defendant, who is the owner of a building, has no eaves-trough,

gutter, or other conductor to prevent the water falling and gathering on his roof from being discharged and thrown against and upon the wall of an adjoining building, and the plaintiff, as the owner of such adjoining building, brings an action against the defendant to recover damages for permitting the water falling on the roof of defendant's building to be discharged against and upon the wall of his building; and there is no evidence tending to show that the injuries complained of resulted from extraordinary or accidental circumstances; and no evidence tending to show that the defendant had any right, by grant, permission, or prescription, to allow the rain falling upon his building to be discharged from the eaves thereof upon the adjoining building: *held*, that the following portions of the charge given to the jury are misleading, and, in a very close case, sufficient ground for reversing the judgment rendered against the plaintiff, namely: "The defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances;" and "a party has no right to make any erections on his premises, and allow them to remain, so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such length of time as furnishes a presumption of a grant so to do, which is usually for a term of years,—twenty years or more for prescription,—but if by permission or grant, no particular length of time is required.

**Error from Cherokee county.**

On June 27, 1882, D. P. Hazeltine commenced his action against Daniel H. Edgmand to recover damages from the defendant for permitting the water falling on the roof of his (defendant's) building to be discharged against and upon the wall and building of plaintiff, and to obtain a restraining order preventing the defendant from continuing the nuisance. At the commencement of the action the probate judge of Cherokee county granted a temporary injunction, as prayed for in the petition, and fixed the amount of the undertaking at \$200. On November 29, 1882, the defendant filed his answer, consisting of a general denial only. Trial had at the October term of court for 1883, before a jury. The court, CHANDLER, J., presiding, instructed the jury as follows:

"The petition in this case has been read to you, and, in substance, so far as is necessary for your consideration, it states: That on the sixteenth day of May, 1881, and for a long time prior thereto, and at the time of filing the petition, the plaintiff and the owner in fee-simple of the following described real estate, to-wit, seven (7) feet off the east side of lot number fourteen, (14,) and twenty-five (25) feet off the west side of lot number fifteen, (15,) in block number sixteen, (16,) in the city of Columbus, Cherokee county, and the buildings and improvements thereon; and that at said date the plaintiff had erected on the premises a one-story business house, the east wall of which was wholly built upon the premises of plaintiff, and that the east or outside line of said wall was about one inch west of the east line of said premises, above described, leaving about one inch on the east side of said premises unoccupied; that said east wall of said building is of the length of one hundred and twenty (120) feet, in height twenty-one (21) feet, and in thickness two (2) feet, and constructed of stone and mortar; and that said plaintiff, since the first day of August, A. D. 1881, has used and occupied said building for a hardware store; and that on the sixteenth day of May, 1881, the said defendant, Daniel H. Edgmand, became the owner in fee of the following described premises: one (1) foot off the east side of lot number fifteen, (15,) and nineteen (19) feet off the west side of lot number sixteen, (16,) all in block number sixteen, (16,) in the city of Columbus, in Cherokee county, and the buildings and improvements thereon. That there was at that date, and still

remained at the time of filing the petition, erected on said premises, a large two-story frame building, the west side of which is built near to or upon the west line of said premises last above described, and adjoining the premises of the plaintiff above described on the east side; and that the roof on the west side of said building of the defendant is constructed so near to the division line between the premises of the plaintiff and the defendant that the water falling upon or accumulating upon the west side of the roof of the defendant's building is permitted by said defendant to be carried by said roof and deposited in and upon the said east wall of said building of the plaintiff, whereby he, the said plaintiff, has been greatly damaged; that the water so as aforesaid permitted by the defendant to be carried and deposited upon and against the said wall of the said building of plaintiff has permeated said wall, and soaked through the same to the inside of the said building, wetting, staining, and softening the mortar and plastering in and upon said wall, and thereby loosening the stones in said wall, rendering the same weak and insecure, and liable to fall, and staining, rusting, and moulding and dampening the goods, wares, and merchandise of the plaintiff placed on the shelves against said east wall, to the nuisance of the plaintiff, and to his great and irreparable damage and injury; that said defendant, since the sixteenth day of May, A. D. 1881, has, by himself and his tenants, occupied said premises so as aforesaid owned by him, and that from said date said defendant, to the time of the filing of said petition, well knew, and was fully informed, of the fact that the water escaping from his said roof was carried and deposited upon and against said wall of the plaintiff's building, to the plaintiff's great damage and injury, and was a nuisance to the plaintiff; and that the defendant, although often requested by the plaintiff to make such repairs to his said building, and provide said building with the necessary gutters and pipes to prevent the water escaping from said roof from being carried and deposited against and upon the wall of plaintiff's building, and thereby doing plaintiff great and irreparable injury and damage, yet the defendant wholly neglected and refused to make such repairs; and that the deposit of water upon and against the said wall of plaintiff from the roof of the defendant's building, with the knowledge and consent of the defendant, is a nuisance to the plaintiff, by reason of which he has sustained great damage and injury in the past, in the sum of one thousand (\$1,000) dollars, and its continuance will occasion the plaintiff great and irreparable injury.

"To the averments of the petition, which are, in substance, as I have directed your attention, the defendant files an answer putting in issue the averments of said petition; and so putting them in issue, the affirmative of this case rests with the plaintiff, and the burden of the proof rests upon him, and he must satisfy you by a preponderance of evidence in this case of the correctness of all the material averments of his petition, and that he has sustained damages in whole or in part as he has therein averred.

"By a 'preponderance of evidence,' I mean that evidence which the court has permitted to go to you in the shape of facts, acts, circumstances, and direct evidence surrounding this case, as you have heard it, and then from the witness in this case, which you accept under the rules herein given you, as outweighing or overbalancing the evidence of the defendant, and as sustaining the averments set out in the plaintiff's petition.

"Preponderance of the evidence is not necessarily established by the greater number of witnesses who have testified in this case; it may, or may not, as you shall find the facts to be (if at all) under the rules herein given you; but it is that evidence, whether it comes from one witness, or any number of witnesses, or from facts, acts, circumstances, or all, developed on the trial of the cause, which you accept as outweighing or overcoming that of the defendant (if at all) as sustaining the averments of the plaintiff's petition.

"There are, however, no degrees of preponderance. It may be slight or

great, (if at all.) It is enough if it preponderates slightly, or in any higher degree of comparison; but it must preponderate in favor of the plaintiff before he can sustain this action.

"If the plaintiff has offered evidence which tends to sustain the averments of his petition, and the defendant has offered evidence of a like character and weight, so that, when weighed by you as jurors under the rules herein given you, one balanced the other, or that of the defendant outweighs that of the plaintiff, then the evidence would not preponderate in favor of the plaintiff, and your verdict must be for the defendant.

"It is admitted on this trial that at the time of the commencement of this action, and prior thereto, the plaintiff was the owner of the premises described in his petition as his. It is admitted, also, on this trial, that the defendant, on the sixteenth day of May, 1881, became the possessor and owner of the premises which it is claimed he owns, as averred in the petition, and that he was the owner of the premises on the sixteenth day of May, 1881, and now is the owner thereof; and plaintiff, for the purpose of establishing the averments of the petition, has given evidence for the purpose of showing that some time in August, 1882, and my recollection is about the tenth day of August, he took possession of the store building, which he claims he is the owner of, and from that time up to the time of the commencement of this action, and to the present time, he has been occupying the same as a hardware store; and that on the east wall thereof he has goods of the character described to you, consisting of augurs, scissors, knives, forks, spoons, and other property, the character of which you will probably recollect; and that during a portion of that time, and in the months of February and March and April, (and you are to determine that from the evidence, whether my recollection is correct or not,) the defendant allowed water, which descended in the shape of rain, to escape from the roof off the west side of his building, and allowed it to flow against and strike against the east side of his (plaintiff's) building, to his damage, on account of the water damaging the building and injuring the goods in question.

"The court says to you that a person has the right to do any act upon his own property or land, or make such erections thereon, or have buildings thereon, which did not violate the rights of his neighbor or his property; and to this extent he has full control over his premises in the erection or maintaining of his buildings already erected. He has no right to make any erections thereon, and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, except upon or by express grant or permission, or else by prescription for such a length of time as furnishes a presumption of a grant so to do, which is usually for a term of years,—twenty (20) or more for prescription,—but if by permission or grant, no particular length of time is required.

"In this case the defendant has a right to keep and maintain the building on or near the line of his lot so long as he keeps the same in the condition that it does not injure the plaintiff by the water or rain falling from the roof thereof on the plaintiff's premises, for which he avers damages in his petition in this action.

"And if it is so kept and maintained, then the defendant should not be held answerable in this action in damages to the plaintiff. If he does make such use of his property negligently as to damage his neighbor, he does so at his peril, and he is liable for injuries naturally resulting from his act.

"While buildings are necessary for business and the habitation of man, and essential for all affairs and uses in business, yet the owners of them are called upon to exercise the highest degree of care to prevent their becoming a nuisance to others; and it is the duty of the owner and occupier of a building on a division line to keep gutters or other appliances for the discharge of water from the roof of his building in proper repair and condition to carry off water

that collects thereon, and he is bound to have them of sufficient capacity to carry off the water that may fall in storms likely to occur.

"And if, in this case, the defendant,—and whether he did or not is for you to determine,—from any cause that could have been prevented, and by the exercise of ordinary care, failed to carry the water from his roof, whereby the building or property of the plaintiff is damaged, as alleged in the petition, the defendant is liable for all the consequences resulting from such defects or acts, unless the same resulted from extraordinary or accidental circumstances.

"If you should find from the evidence in this case that these buildings are located and situated in the manner concerning which evidence has been given you, and on account of rains falling upon the property of defendant the water was thrown against the building of plaintiff in this action, and it damaged his goods in the manner claimed by him, then the defendant is answerable for all the injury resulting from the rain which fell on the building in that manner, for the reason the plaintiff had the right to occupy his premises free and uninterrupted, and the defendant did not have the right to use his premises to the injury of the plaintiff under such circumstances.

"(5) Evidence has been offered on the part of the defendant for the purpose of showing that his building stands at one end several inches from the building of the plaintiff, and at another end about eighteen (18) inches or more; and that the building which the defendant owned leaned to the east, and on account of its leaning the water falling from his roof on the eaves thereof could not strike or injure the plaintiff's building or property in the manner claimed by him; but that the water which fell from his (defendant's) roof fell against his own building, and upon his own property, and not upon or against that of the plaintiff.

"(6) If you should find the water fell on his own ground or building, and did not injure that of the plaintiff, then, of course, the plaintiff could not recover in this action under such circumstances, and it is for you to determine what the fact is in this particular, as in all particulars.

"Evidence has also been introduced by the defendant for the purpose of showing the character of the weather, concerning which evidence has been given, and during the time for which the plaintiff claims damages; that a wall of this character would absorb dampness and wet naturally, from natural causes, and that the damage complained of by the plaintiff resulted from that cause.

"If you should find that to be the fact in this case, then the plaintiff cannot recover in this action; for no man can be made liable for injuries resulting purely from natural causes,—that is, he would not be liable for the act of God; that is, natural causes, which happen from natural laws or natural events or course of things,—and he should not be held to answer because it rained, or because of protracted rain, if the damage complained of was not the act of the defendant in this action, and he did not contribute thereto.

"The principal facts and questions for you to determine are: (1) Did the water escape from the roof of the defendant's building, and damage the property of the plaintiff in this action, as claimed by him, in whole or in part? (2) Did it escape from the roof of the defendant in the manner claimed by plaintiff? (3) Did it damage him (the plaintiff) in the manner complained of by him? (4) Did the water in falling from the roof of the defendant's building fall naturally against the building of the defendant, or upon his ground?

"And, in addition to that, the further question arises: What damage, if any, has the plaintiff sustained in this action, if you should find water had flowed against his building as claimed by the plaintiff?

"The rule and measure of damage would be, if you find for the plaintiff, whatever necessarily and directly resulted from the escape of water in the

manner claimed by plaintiff, as shown by the evidence, or the direct result of that flow, as shown by the evidence in the action, which the plaintiff has sustained, if any, unless you should find the plaintiff, by his own negligent act, permitted the property on the shelves, concerning which he has given evidence, with a knowledge of the water flowing, to remain there and become injured, with a full knowledge of the water flowing as claimed by him.

"While the defendant in this action would not be permitted to injure or damage the property of the plaintiff, yet, if the plaintiff knowingly and willfully allowed his property to remain against the wall and become injured, he cannot complain of the damage to such property, (if any,) for the reason it was his duty to exercise ordinary care and diligence in the protection of his property under such circumstances.

"If you should find that water did flow from the roof of defendant's building against the property or the building of the plaintiff, then the law presumes nominal damages resulted on account thereof; and although you may find he sustained no actual damages, yet he would be entitled to what is known in the law as 'nominal damages' for the act, providing it flowed against the building in the manner claimed by the plaintiff, by the wrongful or negligent act of the defendant.

"If you should find the fact to be, as claimed by the defendant, that the water fell upon his own premises, then there would be no damages resulting to the plaintiff in this action.

"Concerning the question of damages, the only evidence which has been offered in this trial is the evidence of the plaintiff himself, and he has given you his version of the amount of damages which he claims to have sustained in this action, and you will ascertain the damages, if any, from the evidence in this case.

"Under the laws of our state, parties to a civil action are made competent witnesses to testify in their own behalf, and, as such, the plaintiff and defendant have been upon the stand, and given their evidence relative to the injury complained of. The fact that they are parties to a suit should in no way militate against them in their evidence, or their credibility as witnesses, —that is, that fact alone; but the fact that they are parties, and the interest which they may have in your verdict, you may take into consideration for the purpose of determining the question as to whether or not they would allow the evidence which they have given to be warped, or whether they would undertake to give evidence untruthfully, or misconstrue, or incorrectly give, the evidence which they have narrated upon the stand. It is for you to determine whether that is the case or not; and in such evidence they are to be governed by the same rule as other witnesses, to which I shall presently call your attention.

"I say to you that the evidence of the witness C. B. Foster shall not be considered by you in determining the question whether or not the water from the roof of the defendant injured the plaintiff's property, as claimed by him, for the reason that, in the case which Mr. Foster gave, the wooden building butted up against the wall.

"Gentlemen of the jury, you are the exclusive judges of the facts established by the evidence in this case, the credibility of the witnesses, and the weight which you will give to the evidence of each of them.

"It is your right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack thereof, their interest in the prosecution or defense in this action, the relation they bear to each other, their means of knowing the facts concerning which they give evidence, their temper, feeling, or bias, if any has been shown, and from all the surrounding circumstances appearing on this trial, which witnesses you will believe, and which are most worthy of credit in this action, and give credit accordingly; but if the

evidence of a witness appears to be fair, is not unreasonable or improbable, and is consistent with itself, and the witness has not, in any manner, been impeached, then you have no right to disregard the evidence of such witness from mere caprice, or without cause.

"It is your duty, in passing upon the credibility of the several witnesses who have testified in this cause, for the purpose of arriving at a proper verdict in this action, to reconcile all the different parts of the testimony, if reasonably possible, giving to each witness credit for what the law presumes,—that is, truthfulness concerning the facts about which he or she testifies; but if you cannot do so, then you are to decide for yourselves whom you will believe, under the rules herein given you.

"In case you find that a witness has deliberately and intentionally, or willfully and corruptly, testified falsely as to any material fact in this case, you are at liberty to disregard and reject his or her entire evidence; but you are not obliged to do so, for a witness may be mistaken, or testify falsely, as to some part of his or her evidence, and be truthful and correct as to the balance thereof, and it is for you to determine, under all the circumstances of the case, how much credit you will give to the evidence of each witness and all witnesses who have testified herein, observing the rules which I have given you. Candidly consider the evidence in this case, free from passion and prejudice, fear or favoritism, and arrive at your verdict from all the evidence submitted to you, and the law thereof as you have heard it from the court.

"You will designate one of your number to serve you as foreman, sign your verdict by him as you shall find it, and return it into open court.

"If you find for the plaintiff, your verdict will be: 'We, the jury, find the issues joined in this action in favor of the plaintiff, and assess his damages at \$——.'

"If you find for the defendant, your verdict will be: 'We, the jury, find the issues joined in this action in favor of the defendant.'"

The jury returned a verdict in favor of the defendant. The plaintiff filed a motion for a new trial, which was overruled. He also filed a motion that the temporary injunction heretofore granted be made permanent. This was also overruled. Judgment was thereupon rendered for the defendant. The plaintiff excepted to the various rulings of the court, and to the rendition of judgment against him, and brings the case here.

*Ritter & Skidmore and Cowley & Hampton, for plaintiff in error.*  
*M. M. Edmiston, for defendant in error.*

HORTON, C. J. In the spring and summer of 1881, D. P. Hazeltine constructed a stone building, with a brick front and tin roof, upon his premises, in the city of Columbus, the side walls of which, from the top to the foundation, were about 21 feet; the length of the building, 120 feet; the foundation, about 3 feet deep in the earth; and the walls above the foundation, 2 feet thick, the east wall of the building being located 1 inch west of the east line of his lot. In August, 1881, Hazeltine moved into his building, and opened up a hardware store. He had shelves on the inside of his east wall, where he kept spoons, scissors, knives, locks, screws, hinges, etc. In May or April, 1881, Daniel Edgmand purchased the Commercial House, a two-story frame building, about 20 feet wide, with a main part about 60 feet long, and a kitchen extending back. This building was situ-

ated upon a lot adjoining and east of Hazeltine's premises. The building had a shingle roof sloping east and west from the center, about one-third pitch. On the west side the roof had no eaves-trough, gutter, or other conductor for catching and carrying off the rain or water falling upon the building. At the south end, near the ground, the walls of the building were from five to seven inches apart. Upon the ground, at the north end, they were from 20 to 30 inches apart. The wooden building leaned to the east, and the space between the buildings gradually widened from the south to the north end, and from the ground up, so that the space between the walls of the buildings at the top ran from 10 to 33 inches. The roof of the wooden building was about two feet below the top wall of the stone building. The eaves of the wooden building projected beyond the face of the walls. In the petition it is alleged that the rain and water falling upon the roof of the wooden building was discharged and thrown against and upon the east wall of the stone building; that the rain and water penetrated through the wall and plastering, staining the wall and cracking the plastering, whereby the shelf hardware in the stone building became damp and rusty.

Upon the trial, the court, over the objection of plaintiff below, charged the jury as follows:

"While buildings are necessary for business, and the habitation of man, and essential for all affairs and uses in business, yet the owners of them are called upon to exercise the highest degree of care to prevent their becoming a nuisance to others, and it is the duty of the owner and occupier of a building on a division line to keep gutters, or other appliances, for the discharge of water from the roof of his building, in proper repair and condition to carry off the water that collects thereon, and he is bound to have them of sufficient capacity to carry off the water that may fall in storms likely to occur.

"And if, in this case, the defendant,—and whether he did or not is for you to determine,—from any cause that could have been prevented, and by the exercise of ordinary care, failed to carry the water from his roof, whereby the building or property of the plaintiff was damaged, as alleged in the petition, the defendant is liable for all the consequences resulting from such defects or acts, *unless the same resulted from extraordinary or accidental circumstances.*"

This instruction was unfortunate in the language employed, and was very liable to mislead the jury. All the evidence shows that the defendant below had no gutters or other appliances to catch and carry off the rain or water falling on his west roof; therefore it is clear that he did not exercise any care to prevent the water falling upon his own roof from being discharged upon the wall of plaintiff. No principle is more firmly established than that contained in the familiar maxim, *sic utere tuo ut alienum non laedas*; and if the water from the defendant's roof fell upon plaintiff's building on account of the neglect of defendant to have a trough or gutter, or some other conductor, to the injury of plaintiff's wall and hardware, the defendant is liable.

Then, again, there was no evidence in the case tending to show that any water or rain was discharged upon plaintiff's building from extraordinary or accidental circumstances. Extraordinary and accidental circumstances are sometimes construed to mean something in opposition to the act of man, as storms. In any event, the law would require the defendant to have troughs or gutters of sufficient capacity to prevent the rain or water falling upon his building, in all storms likely to occur, from being discharged upon plaintiff's building. *Bellows v. Sackett*, 15 Barb. 96; Wood, Nuis. § 118. In addition to there being no evidence tending to show the circumstances referred to in the charge, without further explanation the jury would be very liable to misunderstand and misconceive the purport of the words "extraordinary or accidental." The paragraph commencing "And if in this case," etc., should have been omitted.

Again, in another part of the charge, the following language was used:

"The court says to you that a person has the right to do any act upon his own property or land, or make such erections thereon, or have buildings thereon, which do not violate the rights of his neighbor, or his property, and to this extent he has full control over his premises in the erection or maintaining of his buildings already erected. He has no right to make any erections thereon, and allow them to remain so near another's land that the rain falling thereon is discharged from the eaves upon adjoining buildings or land, *except upon or by express grant or permission, or else by prescription for such a length of time as furnishes a presumption of a grant so to do, which is usually for a term of years,—twenty years or more for prescription,—but if by permission or grant, no particular length of time is required.*"

There was no evidence tending in any way to show that the defendant had the right to let the water falling on the roof of his building be discharged upon or against the plaintiff's building, by grant, permission, or prescription. All of the exceptions stated should have been left out of the charge, as they were liable to mislead and confuse the jury.

As far as possible, instructions should be applicable to the evidence presented upon the trial; and we think, considering the verdict in this case, that the jury were probably misled by portions of the charge, which were not supported by the evidence, and in this case were wholly irrelevant. The evidence is very conflicting and contradictory as to whether the water from the defendant's roof actually fell upon the wall or building of the plaintiff, and therefore the mischief is the greater from the instructions given upon matters not in evidence. *State Sav. Ass'n v. Hunt*, 17 Kan. 532; *Raper v. Blair*, 24 Kan. 374; *Railway Co. v. Peavey*, 29 Kan. 169; *Feineman v. Sachs*, 33 Kan. 621; S. C. 7 Pac. Rep. 222; *Railway Co. v. Fray*, 31 Kan. 739; S. C. 3 Pac. Rep. 550.

The judgment will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

(35 Kan. 123)

## FENLON v. GOODWIN and others, Partners, etc.

Filed April 9, 1886.

## ERROR—WAIVER OF ERROR—ACQUIESCENCE IN ORDER.

Where a suitor brings to the supreme court for review an order of the district judge at chambers discharging an attachment that had been obtained at his instance, and, after the petition in error is filed, voluntarily releases the attached property, and causes it to be delivered to the adverse party, *held*, that he thereby acquiesces in and affirms the order complained of, and waives any error that may have been made in discharging the attachment.

Error from Mitchell county.

*Yonge & Scott, T. P. Fenlon, and Wm. C. Hook*, for plaintiff in error.

*A. H. Ellis*, for defendants in error.

JOHNSTON, J. On November 24, 1884, the plaintiff brought suit against the defendants upon a promissory note executed by them for \$1,050. At the same time he filed an affidavit upon which an order of attachment was obtained, which was levied upon a valuable herd of cattle belonging to the defendants. On December 5, 1884, the defendants, in an affidavit, denied the grounds laid for attachment, and moved to discharge the same. A hearing was had before the judge of the district court at chambers, whereat both written and oral testimony was offered, which resulted in an order discharging the property. The plaintiff excepted, and brought this proceeding to review that order. It has been made to appear here, on a motion to dismiss this proceeding, that since the petition in error was filed in this court, the sheriff, who had the custody of the attached property, at the instance of the plaintiff, proposed to John S. Goodwin to release the cattle from the attachment, and deliver them to Goodwin, provided he would release a claim which he held for feed furnished for the cattle while they were in the possession of the sheriff. This proposition was accepted, and the sheriff states that on March 31, 1885, he released the cattle, and unconditionally delivered them to the defendant John S. Goodwin. Goodwin immediately took possession of the cattle, and has ever since managed and controlled the same as his own, and has advertised for sale and sold the greater number of them, without objection from the sheriff or the plaintiff.

The motion to dismiss the proceeding must be sustained. By voluntarily surrendering and delivering the property to the defendants the plaintiff has acquiesced in the order of the district judge which was brought up for review. The only question presented to the district judge, and the only one pending here, was as to whether the property should be retained, under the process of the court, to await the final determination of the action between the parties, or whether it should be released from the attachment, and delivered to the defendant. The plaintiff has elected to end the controversy, and by his voluntary act has yielded all that was sought in the application for

a dissolution of the attachment. He has ratified and affirmed the order of the district judge. The thing commanded to be done in the order made by the judge has since been voluntarily done by the plaintiff, and thus he has confessed that the order was rightfully made, and has thereby waived any error that may have occurred. It has been stated by this court that "a party who complains of a judgment must be consistent in his conduct with reference to it. If he recognizes its validity, he will not be heard to say that it is invalid." *Babbitt v. Corby*, 13 Kan. 612. The case cited applies here. There a party claimed title to a tract of land under two tax deeds. The court found against his title, but also found that he was entitled to the payment of the taxes paid upon the land, with interest. After commencing proceedings to reverse the decree of the court, he voluntarily accepted the money adjudged to be paid to him; and it was held that, by voluntarily accepting the proceeds of the judgment, he waived any errors, if there were any. And here the release of the attached property, not only operates as a waiver, but it disposes of the question pending between the parties, and leaves no actual controversy for our determination.

The motion to dismiss will therefore be allowed.

HORTON, C. J., concurring.

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(35 Kan. 106)

ROSE v. HAYDEN.

Filed April 9, 1886.

TRUST—RESULTING—PURCHASE OF LAND BY AGENT.

Where a person, desiring to purchase a piece of land, employs, by parol, a firm of land agents to negotiate for the purchase of the land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name, and afterwards the principal tenders to the agent an amount of money equal to the purchase money, and an additional amount sufficient to compensate the agent for all his services, and also tenders a deed for the land for the agent to execute to the principal, and demands of the agent that he shall execute the same, but the agent refuses, and claims to own the land himself, *held*, under these facts, and by operation of law, that the agent holds the legal title to the land in trust for his principal; that the principal holds the paramount, equitable title thereto, and by keeping his tender good may recover the property in an action in the nature of ejectment; and this, notwithstanding the statute of frauds, and the fact that the employment of the agent was only in parol, and the further facts that the principal did not advance the purchase money, and has never been in the possession of the property, nor made any improvements thereon; that the case is not one of the creation of an express trust, either by parol or in writing, nor one of the express transfer of any interest in real estate either by parol or in writing, but is simply a case of resulting trust, brought into existence by the operation of law upon the facts of the case, and that the case does not come within the statute of frauds; and that the authority of the agent, for the purpose for which he was employed, need not be in writing.<sup>1</sup>

<sup>1</sup>See note at end of case.

Error from Jackson county.

*J. H. Keller and W. S. Hoaglin*, for plaintiff in error.

*Broderick & Rafter and Hayden & Hayden*, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment, brought by Charles Hayden against E. D. Rose, for the recovery of lots numbered 100 and 102, on Wisconsin avenue, in the city of Holton, Kansas. The case was tried before the court, without a jury, and the court made a general finding in favor of the plaintiff, and against the defendant, and rendered judgment accordingly, and to reverse this judgment the defendant, as plaintiff in error, now brings the case to this court. In the court below the plaintiff claimed to hold the absolute title, legal and equitable, to lot No. 100, and claimed to hold the paramount equitable title to lot No. 102, admitting that the defendant held the legal title to that lot, but claiming that the defendant held such title in trust for the plaintiff. On the other side, the defendant claimed to hold the entire title, legal and equitable, to both the lots. The facts of the case appear to be substantially as follows: In September, 1883, Mary Dible owned the patent title to both the lots in controversy, and the plaintiff, desiring to purchase same, employed as his agents in the negotiations therefor the defendant and J. H. Chrisman, who were partners, doing business at Holton, Kansas, as real-estate agents, under the firm name of Rose & Chrisman. Pursuant to this employment, Rose & Chrisman wrote to Mrs. Dible, and ascertained that her price for the lots was \$150, which fact they reported to the plaintiff. In the mean time the plaintiff had learned that there was an outstanding tax title on lot No. 100, which fact he communicated to his agents, Rose & Chrisman, and instructed them to write again to Mrs. Dible, informing her of that fact, and instructed them to ascertain from her whether she would not take less than \$150 for her title to the lots. This they agreed to do. The entire agreement between the plaintiff and Rose & Chrisman was in parol. The plaintiff then purchased the outstanding tax title to lot No. 100, and had the deed therefor executed to S. K. Linscott, and the plaintiff then left the state, and was absent for about three weeks. On his return, he called upon the defendant, Rose, to ascertain what had been done concerning the lots, and Rose then informed him that he had purchased the lots for himself, taking the deed therefor in his own name, and had paid therefor \$85. The plaintiff then informed Rose that he owned the outstanding tax title on lot No. 100; that, although the title was in Linscott's name, yet that Linscott had no real interest therein, but simply had the title to the lot for the benefit of the plaintiff. The plaintiff then tendered to Rose \$110, and also tendered to him a deed, and demanded that he should convey the title to the lots to the plaintiff; but Rose refused. Afterwards, and on October 30, 1883, Linscott executed a quitclaim deed for lot No. 100 to the plaintiff, and the plaintiff then brought this action for the

recovery of both the lots. The plaintiff has at all times kept his tender good.

In this state, the action of ejectment is an equitable remedy, as well as a legal remedy, and in such action the party holding the paramount title, whether legal or equitable, or both, or partly one and partly the other, may recover. The only question, then, for us to consider in this case is, which has the paramount title to the property in controversy, the plaintiff or the defendant? That the defendant, with his partner, was the agent of the plaintiff to carry on negotiations for the purchase of the lots in controversy for the plaintiff there can be no question; and but little question as to the nature and character of the agency. The defendant, with his partner, was simply to carry on negotiations for the purchase of the lots, under the directions and instructions of the plaintiff, and for the plaintiff. Under such circumstances, could the defendant purchase the property for himself, in his own name, and with his own money, and take the title to himself, without becoming a trustee for the plaintiff, at the option of the plaintiff, and holding the legal title to the property merely in trust for the plaintiff, and until the plaintiff should repay him the amount which he had expended in the purchase of the property and reasonable compensation for his services? Except for the statute of frauds, which we shall hereafter consider, we think he could not. *Krutz v. Fisher*, 8 Kan. 90; *Fisher v. Krutz*, 9 Kan. 501; *Lees v. Nuttall*, 1 Russ. & M. 53; S. C. on appeal, 2 Mylne & K. 819; *Taylor v. Salmon*, 4 Mylne & C. 134; *Heard v. Pilley*, 4 Ch. App. 548; *Massie v. Watts*, 10 U. S. (6 Cranch) 148; *Winn v. Dillon*, 27 Miss. 494; *Wellford v. Chancellor*, 5 Grat. 39; *Church v. Sterling*, 16 Conn. 388; *Rhea v. Puryear*, 26 Ark. 344; *Sweet v. Jacocks*, 6 Paige, 355, 364; *Matthews v. Light*, 32 Me. 305; *McMahon v. McGraw*, 26 Wis. 615; *Barziza v. Story*, 39 Tex. 354. See, also, the various cases hereafter cited.

But can the statute of frauds make any difference? Under the authorities cited by the defendant (plaintiff in error) he claims that it not only can, but does. Under such authorities he claims that the plaintiff has no remedy, and is not entitled to any relief. The following are the principal authorities cited by the defendant: 2 Sugd. Vend. (8th Amer. Ed. from 14th Eng. Ed.) c. 21, § 1, par. 15; 2 Story, Eq. Jur. § 1201a; *Bartlett v. Pickersgill*, 1 Eden, 515; S. C. 4 East, 577, in note to *King v. Boston*; *Burden v. Sheridan*, 36 Iowa, 125; *Allen v. Richard*, 83 Mo. 55; *Botsford v. Burr*, 2 Johns. Ch. 405; *Nixon's Appeal*, 63 Pa. St. 279; *Steere v. Steere*, 5 Johns. Ch. 1; *Perry v. McHenry*, 13 Ill. 227; *Walter v. Klock*, 55 Ill. 362; *Watson v. Erb*, 33 Ohio St. 35; *Pinnock v. Clough*, 16 Vt. 500; *Hidden v. Jordan*, 21 Cal. 92.

Under the authorities cited by the plaintiff it is claimed that the statute of frauds makes no difference. It is claimed that, with or without the statute of frauds, a trust resulted by operation of law in

favor of the plaintiff, and that the defendant simply holds the legal title to the property in trust for the plaintiff. The principal authorities cited by the plaintiff, in addition to those which we have already cited for him, are the following: *Chastain v. Smith*, 30 Ga. 96; *Cameron v. Lewis*, 56 Miss. 76; *Gillenwaters v. Miller*, 49 Miss. 150; *Sandford v. Norris*, 4 Abb. Dec. 144; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Wood v. Rabe*, 96 N. Y. 414; *Burrell v. Bull*, 3 Sandf. Ch. 15; *Bennett v. Austin*, 81 N. Y. 308; *Hargrave v. King*, 5 Ired. Eq. 480; *Kendall v. Mann*, 93 Mass. 15; *Jackson v. Stevens*, 108 Mass. 94; *McDonough v. O'Neil*, 113 Mass. 92; *Sandfoss v. Jones*, 35 Cal. 481; *Snyder v. Wolford*, 33 Minn. 175; S. C. 22 N. W. Rep. 254; *Soggins v. Heard*, 31 Miss. 426; *Seichrist's Appeal*, 66 Pa. St. 237; *Peebles v. Reading*, 8 Serg. & R. 484; *Onson v. Cown*, 22 Wis. 329; *Bryant v. Hendricks*, 5 Iowa, 256; *Bannon v. Bean*, 9 Iowa, 395; *Judd v. Mosely*, 30 Iowa, 424; *Jenkins v. Eldredge*, 3 Story, 183, 288-290; *Baker v. Whiting*, 3 Sum. 476, 482, *et seq.*; *Rothwell v. Dewees*, 2 Black, 613; *Cave v. Mackenzie*, 46 Law J. Ch. 564; S. C. 37 Law T. (N. S.) 218; *Fisher*, Eng. Dig. for the year 1877, 400; *McCormick v. Grogan*, 4 Eng. & Ir. App. 97; *Bond v. Hopkins*, 1 Schoales & L. 433; *Dale v. Hamilton*, 5 Hare, 369.

The statute of frauds, upon which the defendant relies, will be found in sections 5 and 6 of the act of the legislature of Kansas relating to frauds and perjuries. The statute, so far as it is necessary to quote it, reads as follows:

"Sec. 5. No leases, estates, or interests of, in, or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law.

"Sec. 6. No action shall be brought whereby to charge a party, \* \* \* upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, \* \* \* unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

The statute relating to trusts and powers, so far as it is necessary to quote it, reads as follows:

"Section 1. No trust concerning lands, *except such as may arise by implication of law*, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The statute relating to conveyances, so far as it is necessary to quote it, reads as follows:

"Sec. 8. Declarations or creations of trust or powers in relation of real estate must be executed in the same manner as deeds or conveyance; *but this provision does not apply to trusts resulting from the operation or construction of law.*"

It will be seen from a reading of section 5 of the act relating to frauds and perjuries, section 1 of the act relating to trusts and powers,

and section 8 of the act relating to conveyances, that all interests in real estate which may arise or be created "by act and operation of law," or which "may arise by implication of law," and "trusts resulting from the operation or construction of law," are not within the statutes requiring a writing for the creation of interests in real estate; and hence it would seem that these statutes cannot apply to the present case; for the plaintiff in the present case does not claim to have any interest in the real estate in controversy except such as arises by operation of law. He does not claim any interest in the real estate in controversy by virtue of *the express terms* of any contract, written or oral. There was no contract, written or oral, that purported to transfer the property, or any interest therein, to the plaintiff. Nor did the plaintiff employ the defendant to take or hold the title to the property, either for the plaintiff or the defendant; nor with or without the defendant's own money. He simply employed the defendant by a simple parol contract to negotiate for the purchase of the real estate for the plaintiff, and of course the plaintiff expected to pay for it himself, and to take the title to himself, and to take such title by a formal and valid written instrument; and when the defendant took the title in the defendant's own name, instead of following the terms of the contract between himself and the plaintiff, he violated the terms of his contract, and abused the confidence reposed in him by the plaintiff. Under the contract as it was actually made, (and it was a parol contract which did not in terms give the property to the plaintiff,) and under the facts and circumstances connected with the contract, and with the parties to the contract before and afterwards, and with the property in dispute, all that the plaintiff claims is merely that which results to him through the operation of law. We think that it is clear that section 5 of the statute of frauds cannot apply to this case. But can section 6 of the statute of frauds so apply? It is difficult to see how even section 6 can apply. The contract between the plaintiff and the defendant, constituting the defendant the agent of the plaintiff, was not "a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them;" but it was simply a contract making the defendant *an agent* to negotiate for the purchase of lands, tenements, and hereditaments and interests in and concerning them; and while section 5 of the statute, which contemplates an absolute transfer of an interest in real estate, requires that the authority of an agent empowered to transfer the same shall be in writing, yet section 6 of the statute, which merely contemplates a *simple contract* for the future transfer of some interest in real estate, does not require that the authority of the agent shall be in writing. There is a marked distinction between the language of the two sections. Even a contract giving authority to an agent to make a contract for the sale of real estate need not be in writing under section 6, (1 Reed, St. Frauds, § 379, and cases there cited; *Rottman v. Wason*, 5 Kan. 552; *Butler v. Kaulback*, 8 Kan. 669, 675, 676; *Ayres v.*

*Probasco*, 14 Kan. 187, 188;) and certainly a contract authorizing an agent to make a contract for the purchase of real estate need not be in writing. In our opinion, neither section 5 nor section 6 of the statute of frauds can apply to this case.

The principal defect, as we think, in the reasoning of the defendant is in his not making any distinction between trusts or interests in real estate which are *expressly created* by the terms of the parol contract itself, and trusts or interests which arise from facts and circumstances which sometimes include a parol contract, but which arise from such facts and circumstances only by implication or operation of law; and the authorities which he cites are, so far as they are applicable to this case, and so far as they maintain the doctrine which he urges, alike defective; and, indeed, we do not think that they truly state the law. The defendant and his authorities also make the mistake of supposing that the statute of frauds may be used as an instrument of fraud. Such was not the intention of the legislature. The intention of the legislature in enacting the statute was to prevent fraud. And the statute should be enforced in its spirit, and not merely as to its letter. The first and leading case upon which the doctrine of the defendant rests is the case of *Bartlett v. Pickersgill*, reported in 1 Eden, 515, and 4 East, 577. But the authority of that case has been denied, and we think overruled even, in England. It was decided in 1760, and in 1829 it was held, in the case of *Lees v. Nuttall*, 1 Russ. & M. 53, that, "if an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal;" and this case was affirmed in 1834 in *Lees v. Nuttall*, 2 Mylne & K. Ch. 819. And this was a case where the agency was created wholly and entirely by parol. In the case of *Heard v. Pilley*, 4 Ch. App. 548, 552, which was decided in 1869, it was held that "a contract for the purchase of land made by an agent will be enforced, although the agent be appointed merely by parol;" and in that case Lord Justice SELWYN used the following language:

"I cannot at all accede to the argument urged in reply that under these circumstances, when the agent goes to the principal, and says, 'I will go and buy an estate for you,' it is not a fraudulent act on his part afterwards to buy the estate for himself and to deny the agency. I think that would be an attempt to make the statute of frauds an instrument of fraud."

In the same case Lord Justice GIFFARD used the following language:

"I cannot help adding, as regards the case of *Bartlett v. Pickersgill*, that it seems to be inconsistent with all the authorities of this court which proceed on the footing that it will not allow the statute of frauds to be made an instrument of fraud."

In the case of *Bond v. Hopkins*, 1 Schoales & L. 433, which was decided in 1802, the lord chancellor uses the following language:

"The statute of frauds says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party

to be charged with it; and yet the court is in the daily habit of relieving where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing, so signed, as a bar to his relief."

In the case of *Cave v. Mackenzie*, above cited, which was decided in 1877, it was held that "a contract for the purchase of land, made by an agent in his own name, vests the equitable estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol." See, also, the other English and Irish cases above cited.

On the other hand, Mr. Sugden, in his work on Vendors, (volume 2, c. 21, § 1, par. 15, 8th Amer. Ed. from 14th Eng. Ed.,) follows the case of *Bartlett v. Pickersgill*, and uses the following language:

"Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself, and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds."

Upon the authority of Mr. Sugden and the case of *Bartlett v. Pickersgill*, Mr. Story, in his work on Equity Jurisprudence, (volume 2, § 1201a,) uses very nearly the same language as Mr. Sugden. This statement of Mr. Story was inserted in his work on Equity Jurisprudence as early as 1843, and it may have been inserted therein at an earlier period of time; and while it may be good law as long as it is confined to *parol express trusts*, it cannot be good law if it be extended to trusts arising merely by implication or operation of law. The objection to this statement is that its language is too broad, and covers cases which cannot properly come within its terms. The following from Mr. Story, enunciated by him at a later period of time, more truly states the law. In 1844, Mr. Story, as judge of the United States circuit court for the first circuit, and in the case of *Jenkins v. Eldredge*, 3 Story, 289, 290, uses the following language:

"It appears to me that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection that the trust is void as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case *sui generis*. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay, must be, proved only by parol. *Bartlett v. Pickersgill* [1 Eden, 515; S. C. 1 Cox, 15, and 4 East, 577, note] and *Leman v. Whitley* [4 Russ. 423] are, I admit, against this doctrine,—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then *Lees v. Nuttall* [1 Russ. & M. 53] expressly decides that if an agent, employed to purchase an estate, purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. *Carter v. Palmer* [11 Bligh, 397, 418, 419] goes the full length of the same proposition."

Also, Mr. Browne, in his work on Frauds, (section 96,) uses the following language:

"It seems to have been held that where, in a case of trust arising upon an agency, the defendant's answer denied the fact of agency, parol evidence was inadmissible to prove it; but the later English cases favor a contrary doctrine."

See, also, Browne, Frauds, § 84.

In the case of *Chastain v. Smith*, 30 Ga. 96, 97, it was held that "where one person agrees, as agent, to buy land for another, as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the statute of frauds, resulting trusts being expressly excepted from the operation of the statute." And Mr. Justice STEPHENS, in delivering the opinion of the court, uses the following language:

"The only question presented in this case is whether or not the statute of frauds is in the way of the specific performance prayed by Mr. Chastain. In the first place, this case was never within the statute of frauds. The substance of the agreement, so far as that particular part of the land to which Mr. Chastain seeks a title is concerned, is that the Smiths would, *as his agent, buy it for him*. They did in fact buy it, but took a title to themselves. This title in their hands was immediately affected with a resulting trust for his benefit by operation of law. Now, a trust raised or resulting by operation of law is expressly excepted from the operation of the statute, and this case, therefore, was not within the statute, from the beginning."

In the case of *Wood v. Rabe*, 96 N. Y. 414, 425, 426, Judge ANDREWS, in delivering the opinion of the court, uses the following language:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction, which, taken together, in our opinion, entitle the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other that when a person, through the influence of a confidential relation, acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. \* \* \* The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds."

It seems to be admitted by the defendant, and also by the authorities which he cites, that where the principal advances the purchase money to the agent, and the agent then purchases the property in his own name and for himself, a trust would result in favor of the principal, and the agent would hold the property merely in trust for the principal. But the defendant claims, and the authorities cited by him seem to sustain him, that as the plaintiff in this case did not advance any of the purchase money, and that as the defendant purchased the property with his own money, no such resulting trust has arisen or could arise. Of course, where the purchase money is ad-

vanced by the principal to the agent, and the agent then purchases the property with his principal's money, and in his own name, it makes out a stronger case of resulting trust than where the agent himself advances the purchase money; but the fact that the principal advances the purchase money cannot be the controlling fact in the case. Many authorities hold that where the agent furnishes the purchase money with the consent of the principal, it will be considered as a loan, and the agent will hold the property purchased in trust for his principal, and as a security to himself for the money advanced by him. *Kendall v. Mann*, 93 Mass. 15; *Sandfoss v. Jones*, 35 Cal. 481; *Soggins v. Heard*, 31 Miss. 426. Also, in many cases the principal may have an interest in the property before he employs the agent to make the purchase, and may simply employ the agent to purchase for the principal an outstanding adverse title for the purpose of bolstering up or protecting the principal's own title. This outstanding adverse title may be very good or very bad; but, whether good or bad, the doctrine cannot at all be tolerated that the agent may, in violation of his duties as agent, purchase for himself the outstanding adverse title, and hold the same adversely to his principal, merely because his principal has not advanced the purchase money, when, in fact, at the time of the employment of the agent the amount of the purchase money could not be at all known.

The question of the advancement of purchase money in such a case should not have much weight. And, in this connection, it might be well to remember that the plaintiff in this case had an interest in the property in controversy at the time when the defendant purchased the same, although it is possible that the defendant may not have known of such interest. The plaintiff held a tax title in the name of S. K. Linscott on one-half of the property in controversy, to-wit, on lot No. 100, at the time the defendant purchased the two lots; and here the question may arise, is it material whether the defendant did have any knowledge of the plaintiff's interest in the property or not? Was the plaintiff bound to divulge his interest in the property to his agent in order to protect his own rights and interests, as against his own agent, and to prevent his own agent from acting adversely to him, and from perpetrating a fraud upon him? This question must certainly be answered in the negative. The principal is entitled to the services which the agent has agreed to perform, without divulging to the agent all his reasons and the necessities which prompted him to make the employment. A contract which has for its object the *actual sale* of real estate and the *transfer of the title* thereto by the terms of the contract itself, is of course within the statute of frauds, and it is generally held, in such a case, that the payment of the purchase money alone cannot take the contract out of the statute of frauds. 4 Kent, Comm. 451; Browne, St. of Frauds, 461. In such a case, the payment of the purchase money does not seem to count for much. Something else must be done in order to take the contract out of the stat-

ute, and we do not think that the payment or non-payment of the purchase money in this case should count for much. We think the trust nevertheless resulted.

The controlling question in this case is not whether the principal advanced the purchase money or not, but it is whether, in equity and good conscience, the agent, who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal, and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot. *Sandford v. Norris*, 4 Abb. Dec. 144; *Wellford v. Chancellor*, 5 Grat. 39; *Onson v. Cown*, 22 Wis. 329; *Winn v. Dillon*, 27 Miss. 494; *Cameron v. Lewis*, 56 Miss. 76; *Gillenwaters v. Miller*, 49 Miss. 150; *Chastain v. Smith*, 30 Ga. 96; *Heard v. Pilley*, 4 Ch. App. 548; *Lees v. Nuttall*, 1 Russ. & M. 53; S. C. affirmed on appeal, 2 Mylne & K. 819; *Taylor v. Salmon*, 4 Mylne & C. 134; *Cave v. Mackenzie*, Fisher, Ann. Dig. 1877, 400; *Baker v. Whiting*, 3 Sum. 476; *Snyder v. Wolford*, 33 Minn. 175; S. C. 22 N. W. Rep. 254; *Peebles v. Reading*, 8 Serg. & R. 484; *Burrell v. Bull*, 3 Sandf. Ch. 15; and other cases heretofore cited.

The defendant also urges, in connection with the statute of frauds, and the fact that the plaintiff did not advance the purchase money, the further facts that the plaintiff has never had the possession of the property in controversy, and has never made any improvements thereon. We do not think that these further facts can make any difference. The plaintiff could not have taken the possession of the property until after he had purchased Mrs. Dible's title thereto, and he employed the defendant for no other purpose than to assist him in purchasing such title; and it was solely the defendant's fault that he never obtained the possession of the property. We think that the other facts upon which the resulting trust is claimed are, aside from possession and improvements, amply sufficient. Even the defendant himself and his authorities would not consider possession and improvements as of any importance if the plaintiff had advanced the purchase money. The facts that the defendant was the agent of the plaintiff for the purpose of negotiating for the purchase of the property; that, in violation of his agency, he purchased the property for himself, and took the title thereto in his own name; and the further facts that the plaintiff has elected to treat the defendant as a trustee holding the property for the plaintiff, and has tendered to the defendant the full amount which the defendant paid for the property, and an additional amount sufficient to compensate the defendant for all his services as agent,—are, we think, sufficient to entitle the plaintiff to recover. But, besides these facts, the plaintiff, as before stated, also had an interest in the property, or in at least one-half thereof, at the time when the defendant purchased the same; and we might further state that the plaintiff had previously employed the defendant to act as agent for him in the purchase of other real estate, and

had paid him for his services, which fact, together with the present employment, indicates that more intimate and confidential relations existed between the parties than a single transaction or a single employment would.

Under the facts of this case as heretofore stated, we think the plaintiff holds the paramount equitable title to the property in controversy, and that the defendant merely holds the naked legal title, and that he holds the same in trust for the plaintiff. Therefore we think the plaintiff is entitled to recover in this action. This renders it unnecessary to consider any of the other questions supposed to be involved in this case. We might, however, say that from a hasty examination of the plaintiff's tax title we are inclined to think that it is also good, and, with reference to lot 100, is a better title than that procured from Mrs. Dible.

The judgment of the court below will be affirmed.

(All the justices concurring.)

#### NOTE.

Plaintiff employed the defendant, by parol, as agent to buy certain lands for him. Defendant bought the lands in his own name, giving his own notes for the purchase money, and afterwards claimed to hold the land as his own. The court held that plaintiff could not compel a conveyance of the lands to himself, and that there was no resulting trust which equity would enforce in plaintiff's favor. *Burden v. Sheridan*, 36 Iowa, 125.

(35 Kan. 228)

### BIRD v. LOGAN and another.

Filed April 9, 1886.

#### 1. HOMESTEAD—BOND FOR CONVEYANCE—JOINT CONSENT OF HUSBAND AND WIFE.

Where a husband and wife execute a bond for a conveyance of their homestead, and they are ignorant and illiterate, and can have no knowledge of the contents of the bond except as they are informed by others; and they execute the bond at different times, and the wife executes the bond after the husband has executed the same, and without any consultation with him, or knowledge of its contents, or its nature or character, or of any of the transactions connected therewith, except as she is informed by a notary public, acting as the agent of the obligee; and she executes the bond under a misapprehension as to the consideration for it, and as to the amount of a lien held by the obligee upon the real estate to be conveyed, which lien he is to remove; and these misapprehensions are brought about and induced by the agent of the obligee; and the consideration for the real estate agreed to be conveyed is inadequate; *held*, assuming that the husband was properly informed concerning all these matters, that there was no sufficient "joint consent" on the part of the husband and wife to the alienation of their homestead, and no sufficient equitable grounds for the specific enforcement of their contract, as will authorize an action in equity on the part of the obligee against the obligors for the specific enforcement of the contract; and *further held*, that the action cannot be maintained, whether the husband was properly informed or not.

#### 2. SPECIFIC PERFORMANCE—CONTRACT, WHEN ENFORCED.

A contract will be specifically enforced only where its specific enforcement is equitable, and, generally, only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and, generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced.

**Error from Atchison county.**

In this case the court below made the following findings and conclusions, to-wit:

**"FINDINGS OF FACT.**

"(1) On and prior to February 20, 1882, the defendants were, and ever since said time they have been, husband and wife, and occupying as their homestead lot 12, block 23, North Atchison, consisting of less than one acre, in the incorporated city of Atchison, in Atchison county, Kansas, the legal title of which homestead was and is in said Isaac Logan.

"(2) On February 20, 1882, said defendants executed and delivered to the plaintiff a mortgage on said real estate to secure the payment of the sum of \$176, with interest at 12 per cent. per annum from said date, of which \$100 thereof was for purchase money of said real estate, and lumber for improvements thereon.

"(3) On November 28, 1882, the plaintiff and said Isaac Logan agreed upon a sale of said premises to the plaintiff for the sum of \$350, from which the mortgage indebtedness was to be deducted. The plaintiff then drew up the bond for deed, a copy of which is annexed to the petition herein; and both of the defendants being illiterate, and unable to write their names, the plaintiff wrote their names at the bottom of said instrument, and also the words 'his mark' and 'her mark,' and also made the two marks by cross. Said Isaac Logan then touched the pen to his mark, and the plaintiff paid him the sum of \$30, and told him that there would be just \$100 remaining to be paid, and that he would pay that sum when the deed was executed by both of the defendants. Said Anna Logan was not present at any of said negotiations, and she had no knowledge of them on that day, nor of the payment of said sum of \$30.

"(4) On November 29, 1882, at the request of the plaintiff and Isaac Logan, J. P. Adams, a notary public, went to the house of the defendants to obtain the signature and acknowledgment of said Anna Logan to said instrument, he having previously taken the acknowledgment of said Isaac Logan thereto. Said Isaac Logan was not at home, but his wife was found there alone. Said Isaac Logan had not told her about the negotiations and transactions with the plaintiff, but she knew of the existence of said mortgage. She and her said husband had had some trouble, and they were not on good terms, although they continued to live together. She at first refused to sign the instrument, or to have anything to do with it, and said that it was the distinct understanding between herself and her husband when she signed the mortgage that it was the last instrument she would ever sign relating to the property. Said J. P. Adams told her that she had a right to sign it or not as she chose; that the plaintiff's claim upon the property was \$250; and that said Isaac Logan might be able to pay it off, in which case it could not be sold. From the statement in the instrument, and some knowledge that said J. P. Adams had about said mortgage, he supposed that the plaintiff's claim upon the property was \$250, when in fact it was only \$192.31, including interest to the date of said instrument; and said Anna Logan believed the representations made by said J. P. Adams. At length she concluded that said Isaac Logan would fail to pay the \$250, and that the mortgage would be foreclosed; and she then proposed that if she could have the remaining \$100 paid to her she would sign the instrument, and said J. P. Adams told her that he would see the plaintiff about it, and that he supposed it could be so arranged that she would get the \$100. She then touched the pen to said mark, and said J. P. Adams left, and he made out the certificate of acknowledgment, a copy of which is appended to the copy of said instrument annexed to the petition herein. She knew nothing about the terms of the contract be-

tween the plaintiff and said Isaac Logan, nor of the real amount of the indebtedness, except as she was then told by said J. P. Adams. Said J. P. Adams stated to the plaintiff that said Anna Logan had signed the instrument, and agreed to make the deed, only on condition that the \$100 should be paid to her, and the plaintiff said that would be all right. On said twenty-ninth day of November, 1882, after the return of said acknowledged instrument to the plaintiff, he duly entered satisfaction of said mortgage upon the record thereof.

"(5) On or about January 1, 1883, the plaintiff made a tender of \$100 lawful money of the United States to said Isaac Logan, and demanded a deed for said real estate, but said Isaac Logan refused to accept the money, and refused to make a deed, on the ground that his wife would not join in it. On the next day the plaintiff sent for said Anna Logan, and she went to his office, and he then and there tendered her the sum of \$100 lawful money of the United States, and demanded a deed for said real estate, but said Anna Logan refused to accept the money, and refused to make a deed unless the plaintiff would pay her \$200, which the plaintiff refused to do. On April 7, 1883, the plaintiff again tendered to both of the defendants, at different places, said sum of \$100, lawful money of the United States; and also tendered to each of them, at different places, a blank deed, properly filled out, for said real estate, and requested the defendants to sign and execute the same; but the defendants each refused to accept said sum of money, and refused to sign and execute said deed for said real estate. Neither of said defendants has ever returned to the plaintiff said sum of \$30, nor any part thereof, nor paid said mortgage debt, nor any part thereof.

"(6) On November 28 and 29, 1882, real estate in that part of the city of Atchison was of dull sale, but the market value of the real estate in controversy was \$400 to \$450, and its value at the present time, no additional improvements having been made, is about \$700."

"CONCLUSIONS OF LAW.

"(1) There was no such joint consent of husband and wife to the alienation of said homestead as should be enforced in equity.

"(2) Said Anna Logan having been influenced to execute said instrument by a materially erroneous statement of the condition of the property by the officer who was the plaintiff's agent, the contract should not be specifically enforced against her.

"(3) The facts stated do not entitle the plaintiff to specific performance.

"(4) Each party ought to pay his and her own costs herein."

*Jackson & Royse*, for plaintiff in error.

*Smith & Solomon*, for defendants in error.

VALENTINE, J. This action, as it was tried in the court below, was an action to compel the specific performance of an alleged contract for the sale and purchase of real estate. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and rendered judgment upon such findings and conclusions in favor of the defendants, and against the plaintiff, and the plaintiff, as plaintiff in error, brings the case to this court for review.

The plaintiff challenges the correctness of both the findings of fact and the conclusions of law, but we are inclined to think that both are correct, and that the final judgment rendered thereon is also cor-

rect. It is admitted that the defendants were and are husband and wife, and that the property in controversy was and is their homestead; therefore any alienation of this property, or any contract for the alienation thereof, to be of any validity, requires that the "joint consent" of both the husband and wife should be given thereto; and this consent must not be brought about by any fraud, deception, or misstatement of material facts by the other party to the alienation, but must be the voluntary and intelligent consent of both the husband and wife. Does the contract in the present case meet these requirements? The defendants were ignorant, illiterate colored people, who did not know how to write even their own names, and could have no knowledge of the written contract sued on, except as they were informed by other persons. On November 28, 1882, the plaintiff held a mortgage on the property in controversy, which mortgage, including principal and interest, amounted to \$192.31. He also paid one of the defendants (Isaac Logan) \$30 in money, and agreed to pay him \$100 more, making in all \$322.31; and for this amount Logan executed the instrument in writing sued on, which was a bond and contract for the conveyance of the property in controversy to the plaintiff.

Whether Logan knew what the exact consideration for this instrument was we shall not now stop to consider, but will pass on to the more important question,—the one concerning the execution of the instrument by the other defendant, Anna Logan. In this connection the questions arise: What was the real consideration for the instrument, and what was it represented to be to Mrs. Logan? The property at the time of the execution of the instrument was worth from \$400 to \$450. It was worth about \$700 at the time of the trial, which was July 22, 1884, without any improvements having been made thereon since the execution of the written instrument. The plaintiff alleged in his petition in the court below that the consideration was \$350. The instrument itself showed that the consideration was \$350. J. P. Adams, a witness for the plaintiff, who was present and heard the parties make the contract, testified that he understood the consideration to be \$350; and the court below found that such was the consideration. In fact, however, the plaintiff has all the time treated the consideration as only \$322.31, and has all the time claimed that \$100 in addition to the mortgage of \$192.31, including principal and interest, and the \$30 paid by the plaintiff to Logan, constituted the entire consideration and the entire purchase money for the real estate in controversy. On November 29, 1882, the next day after the instrument had been executed by Logan, J. P. Adams, a notary public, went to the house of Logan, and found Mrs. Logan alone, who had no knowledge of the transactions previously had between the plaintiff and Logan. He explained to her the nature and character of the instrument, told her the consideration therefor, and as the instrument itself showed that the consideration was \$350, and

as he believed that such was the consideration, he evidently told her that such was the consideration. She refused to sign the instrument. He further told her that there was still \$100 to be paid on the contract, leaving it to be inferred, if he did not tell her so in express terms, that the claim of the plaintiff against Logan was \$250. He also referred to the mortgage held by the plaintiff on the property, of which mortgage she, of course, had knowledge, although it is not probable that she knew what the exact amount of the mortgage was. In all probability he inadvertently led her to believe that the claim of the plaintiff against the land was \$250, when in fact it was only \$192.31, principal and interest; and the court below found from the evidence that all this occurred. It is even doubtful whether all of the \$192.31 was due, *in equity*. They also had conversation concerning the troubles existing between Logan and his wife, and, after a great deal of conversation, Mrs. Logan finally consented to sign the instrument upon the consideration that the \$100 still due should be paid to her and not to Logan. She at that time knew nothing about the transactions that had previously taken place between the plaintiff and Logan, or about the instrument which she executed, except what was told to her by Adams, and the only way in which she executed the instrument was by touching the pen that made the mark which represented her signature. If the real consideration for the contract was \$350, then the plaintiff would still be owing the defendants on the contract \$127.69; but he has never admitted that he owes more than \$100, and has never tendered more than that amount, and the record does not show that he has even kept that tender good. Therefore when Mrs. Logan executed the instrument she was laboring under at least two misapprehensions: first, she believed the claim existing against the land was about \$57.69 more than it actually was; and that the consideration for the sale of the land was \$27.69 more than the plaintiff admits it to be; and these misapprehensions were induced and brought about by Adams, who was evidently acting as the plaintiff's agent.

Under the circumstances of this case, we do not think that the defendants ought to be compelled to specifically perform their supposed contract. The contract, under the circumstances, did not embody such a joint consent of the husband and wife as would, under the homestead laws and in equity, make the contract binding. Assuming that Logan himself had knowledge of all the circumstances that led to the execution of the contract, and knew precisely what the consideration was, still Mrs. Logan did not have any such knowledge, and she signed and executed the contract under misapprehensions brought about by the plaintiff's agent. Now, taking the nature and character of the contract; the inadequacy of the consideration for the property in controversy; the fact that the contract was signed at different times, and without any consultation between the parties signing the same; and the fact that Mrs. Logan signed the same under mis-

apprehensions as to the amount of the consideration, and the amount of the mortgage lien, and misapprehensions induced by the agent of the plaintiff,—we do not think that there is sufficient equity in the plaintiff's claim to authorize the specific enforcement thereof. "Upon breach of a contract for the sale of real estate it is not a matter of course for the court to enter a decree of specific performance. That will be done only when, upon all the facts, it is equitable it should be done. He who asks specific performance should show the facts which make such a decree equitable, and a failure to do so justifies a refusal of the decree." *Fowler v. Marshall*, 29 Kan. 665, syllabus, pars. 1, 2. "While, in legal contemplation, two persons may make a contract that would be enforced at law, yet if it should seem probable, from the facts of the case, that the parties did not in fact and in equity agree to the same thing, the supposed contract would not be decreed in equity to be enforced specifically." *Burkhalter v. Jones*, 32 Kan. 5, syllabus, par. 1; S. C. 3 Pac. Rep. 559. In the Kansas Report the word "specifically" is erroneously changed to "especially;" in the Pacific Reporter it is printed correctly.

We have discussed the questions involved in this case as though Mrs. Logan only was misled into signing the contract through misapprehensions. We think, however, that the same result would follow, possibly not for stronger reasons, but for slightly different reasons, if both Logan and Mrs. Logan were so misled. A contract will be specifically enforced only where its specific enforcement is equitable, and, generally, only where the plaintiff has, in equity and good conscience, a right to demand its specific enforcement; and, generally, where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced.

The plaintiff did not ask to have his mortgage foreclosed in this case, and therefore there was no error in the failure of the court below to order or adjudge its foreclosure. The plaintiff may still enforce his mortgage in another suit, if he chooses.

This, we think, disposes of all the substantial questions involved in this case.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 201)

## ANDERSON v. HIGGINS.

Filed April 9, 1886.

## ERROR—ORDERS IN PENDING SUIT.

The denial of a motion by the district court to dismiss an appeal from a justice of the peace, as well as the appointment of a receiver by the district court, are orders which are not reviewable in the supreme court while the action in which they were made is pending in and undisposed of in the district court.

Error from Shawnee county.

*J. P. Greer* and *J. J. Hitt*, for plaintiff in error.

*Harris & Damran*, for defendant in error.

JOHNSTON, J. Hiram Higgins sued M. M. Anderson before a justice of the peace to recover \$300 alleged to be due as rent for the use of a tract of land. He also caused the issuance of an attachment which was levied upon a crop grown upon the land. A trial was had, which resulted in favor of the defendant. In due time the plaintiff filed an appeal-bond, which recited that the plaintiff intended to appeal from the order of the justice discharging the attachment, as well as from the judgment in favor of the defendant. The cause was transmitted to and docketed in the district court, and the defendant there moved to dismiss that part of the appeal which purports to appeal from the order of the justice discharging the attachment, and ordering the attached property to be restored to the defendant. This motion was overruled, and the court, upon application of the plaintiff, appointed a receiver to take possession of and preserve the attached property during the pendency of the suit. The defendant, as plaintiff in error, brings the case here, and seeks a reversal of these orders of the district court. The refusal of the court to dismiss the appeal from the justice of the peace is not a final order, nor is it one which can be reviewed in this court until the case in which the ruling is made is finally disposed of in the district court. *Edinfield v. Barnhart*, 5 Kan. 225; *Brown v. Kimble*, Id. 80; *Dolbee v. Hoover*, 8 Kan. 124; *Potter v. Payne*, 31 Kan. 218; S. C. 1 Pac. Rep. 617; *Kansas Rolling-mill Co. v. Bovard*, 34 Kan. —; S. C. 7 Pac. Rep. 622. Neither have we jurisdiction to review the other ruling of the district court which is complained of. The order appointing a receiver is not one which can be brought up to this court and reviewed in advance of the cause in which the order is made. *Hottenstein v. Conrad*, 5 Kan. 249; *Kansas Rolling-mill Co. v. Atchison, T. & S. F. R. Co.*, 31 Kan. 90; S. C. 1 Pac. Rep. 274.

The motion of the defendant in error, that this proceeding be dismissed from this court, must therefore be allowed.

(All the justices concurring.)

(35 Kan. 77)

**NEWKIRK v. MARSHALL and another.**

Filed April 9, 1886.

**1. PUBLIC LAND—HOMESTEAD—DEVISE TO DAUGHTER.**

Where a husband, with his wife and daughter, settles upon and occupies a quarter section of government land under the homestead laws of the United States, and makes the proper entry for that purpose, and while so occupying the same, and just before his death, and about five years after such settlement, he executes a will, giving his personal property to his wife, and giving the west half of the quarter section to his wife, and the east half to his daughter, and also in his will appoints his wife as executrix of his last will and testament, and guardian for his daughter, who is a minor, and soon thereafter dies, and immediately after his death his wife has his will probated, and is appointed executrix under it, and receives the personal property under the will, and orally gives the east half of the real estate to the daughter, and promises to make a deed therefor, and she also makes final proof with regard to the homestead settlement, occupancy, etc., and the patent is afterwards issued to her; and while these things are transpiring, the daughter marries, and she and her husband, in pursuance of the parol agreements and understandings with the widow, who is the step-mother of the daughter, that the daughter shall have the east half of said land, take possession of such east half, make valuable improvements thereon, and occupy the same as their homestead for about two years, when the husband dies; and afterwards the daughter goes to Kentucky, where she remains for about 10 years, and while there the land is in charge of the step-mother, but the step-mother at all times recognizes the daughter's ownership thereof, and while there both the daughter and the step-mother are again married, and the daughter, with her husband, returns to the land; and the step-mother, still recognizing the daughter's ownership thereof, and still promising to make a deed to the daughter therefor, the daughter and her husband take possession of the land, and make further improvements thereon, and the parties then quarrel, and the step-mother then forbids their going upon the land, but they do go upon the land, and occupy the same as their homestead; and there is no evidence as to whether the step-mother's husband ever expressed any consent or not that the land should belong to or be occupied by the daughter and her husband; and afterwards the step-mother commences this action in the nature of ejectment to recover the property from the daughter and her husband: *held*, that the action cannot be maintained.

**2. SAME—VESTED RIGHT IN HOMESTEAD, HOW ACQUIRED.**

Under the United States homestead laws, and by a compliance therewith, a vested right is obtained in the homestead at the expiration of five years from the entry thereof.

**3. SAME—CONTRACT BEFORE ISSUE OF PATENT.**

When proper proof of settlement, occupancy, etc., is made in such a case, the person to whom the patent should be issued is entitled to the patent immediately, and may then contract with reference to the land, the same as though the patent had already and in fact been issued.

**4. SAME—POSSESSION AND IMPROVEMENTS.**

In this case, the taking of the possession of the land by the daughter and her first husband under the parol agreements between them and the step-mother, and the making of lasting and valuable improvements thereon, took the case out of the statute of frauds, and also supplied a sufficient consideration for the property; and the acts of the parties since that time have enhanced and made stronger the daughter's equities in and to the land.

**5. SAME—RIGHT OF DEVISEE.**

Under the facts of this case, the daughter is in equity entitled to the land.

Error from Chase county.

*Madden Bros. and F. P. Cochran*, for plaintiff in error.

*Kellogg & Sedgwick*, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment brought by Mary A. Newkirk against John W. Marshall and Mary

E. Marshall, in the district court of Chase county, Kansas, for the recovery of certain land situated in that county. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the defendants and against the plaintiff, and also made special findings of fact, and upon this general verdict and these special findings the court below rendered judgment in favor of the defendants and against the plaintiff, and the plaintiff, as plaintiff in error, now brings the case to this court for review. The facts of the case appear to be substantially as follows: In the year 1861 the N. W.  $\frac{1}{4}$  of section 8, in township 22, of range 8 E., in Chase county, Kansas, was government land. Some time during that year Augustus M. Landsbury, with his wife, Mary A. Landsbury, and his daughter, Mary E. Landsbury, who was then a girl of about 9 or 10 years of age, settled upon and occupied this quarter section of land as their homestead. Landsbury also made an entry for the land under the homestead laws of the United States, but just when he made it is not shown. On November 27, 1866, Landsbury executed a will, giving to his wife, Mary A. Landsbury, all his personal property and the west half of said land, and to his daughter, Mary E. Landsbury, the other half of the land, and appointed his wife executrix of his last will and testament, and guardian for his said minor daughter. Soon afterwards, and some time in the year 1866, Landsbury died.

On January 7, 1867, Mrs. Landsbury caused the will to be probated in the probate court of Chase county, and she was also appointed executrix under the will; and there was also evidence tending to show that she was appointed guardian for her step-daughter, the said Mary E. Landsbury. At the July term of the probate court of Chase county, Mrs. Landsbury made a report, showing that she had paid the debts of the estate, and had a balance remaining in her hands belonging to the estate of \$718, and further showing as follows: "Said balance is in the hands of said Mary Ann Landsbury, as the lawful owner by law of said property, except the one-half of homestead she now lives on, which belongs to Mary Eliza Landsbury, the daughter of deceased." Some time after Landsbury's death, but just when is not shown, Mrs. Landsbury, as his widow, made final proof, under the United States homestead laws, of the settlement and occupancy of the aforesaid land, and also of Landsbury's death, and that she was his widow. Mary E. Landsbury continued to reside with Mrs. Landsbury on the east half of said land, and during all that time it was understood and agreed between them that Mary E. Landsbury owned the west half thereof, and that Mrs. Landsbury should at some time execute a deed to her for the same. Some time in the year 1869 or 1870 Mary E. Landsbury was married to William Wagoner. On May 2, 1870, the patent for the entire quarter section was issued by the United States, conveying the title to Mrs. Landsbury. At that time, all the improvements were on the east half thereof. Some time after the marriage of Mary E. Landsbury to William Wagoner they,

in accordance with the understanding and agreement of all the parties that the west half of said quarter section belonged to Mrs. Wagoner, and under the promise of Mrs. Landsbury that she would execute a deed therefor to Mrs. Wagoner, Mrs. Wagoner and her husband took possession of the land, made permanent improvements thereon, and occupied the same as their residence and homestead for about two years, when Wagoner died. The improvements made on the land by them during their occupancy were worth about \$75. Soon after Wagoner's death, Mrs. Wagoner removed to the state of Kentucky, and resided there for about 10 years.

During all the time that Mrs. Wagoner remained in Kentucky, Mrs. Landsbury had charge of this land, as well as of the east half of the quarter section, leasing the same, receiving the rents and profits thereof, and paying the taxes thereon, and, for a part of the time, occupying the same herself, but all the time recognizing Mrs. Wagoner as the owner thereof; that is, as the owner of the west half of the quarter section. Also, while Mrs. Wagoner was in Kentucky, both she and Mrs. Landsbury were married. Mrs. Wagoner was married to John W. Marshall, and Mrs. Landsbury to a man by the name of Newkirk. In February, 1881, Mrs. Marshall returned from Kentucky to Kansas; her husband, John W. Marshall, having preceded her some three or four weeks. For some time afterwards, they resided with Mrs. Newkirk on the east half of said quarter section, and during nearly all this time Mrs. Newkirk still recognized Mrs. Marshall as the owner of the west half of the quarter section, and accordingly permitted Marshall to make improvements thereon as though the land was his wife's; but finally Mrs. Newkirk and Marshall quarreled, and then she told Marshall that they should not have the land unless they got it by law, and forbade his moving onto the land. Shortly afterwards, however, he, with his wife, did move onto the land, and they have continuously occupied the same as their homestead and residence ever since, and have continued to make improvements thereon. The improvements made upon the land by them after they took possession thereof, and before and after they occupied the same as their homestead, are worth about \$368. Whether Newkirk ever expressed any assent or dissent with respect to the Marshalls' claim to the land is not shown. The land, however, at the time that the Marshalls took the possession thereof was in the actual possession of a tenant of Mrs. Newkirk, which tenant also resided thereon. Soon after the quarrel between Marshall and Mrs. Newkirk, Mrs. Marshall demanded a deed for the land from Mrs. Newkirk, but she refused, and some time afterwards, to-wit, on April 2, 1883, Mrs. Newkirk commenced this action against the Marshalls to recover the land from them. Mrs. Newkirk always, up to the time of the said quarrel, recognized Mrs. Marshall as the actual and present owner of the land in controversy, with an actual and present right to the possession thereof, and always agreed that she would execute a deed for the land

to Mrs. Marshall, although no particular time was ever fixed for the execution of such deed.

Under the foregoing facts, has Mrs. Newkirk a right to recover the land in controversy? The court below held that she has not, but Mrs. Newkirk claims that she has such right, and claims that the court below erred, and founds this claim principally upon the ground that no consideration for the land ever passed from Mrs. Marshall to herself. Was such a consideration necessary under the circumstances? It must be remembered that Mrs. Newkirk herself never paid any consideration for the land. She procured the title thereto merely by virtue of being the widow of Augustus M. Landsbury, who settled upon it and occupied it with his family under the homestead laws of the United States, and his right did not depend upon her any more than it depended upon his daughter, Mrs. Marshall. If he had lived, he could have procured the title thereto by occupying it with his daughter alone, just as well as he could have done by occupying it with his wife alone. A homestead can be entered under the homestead laws of the United States only by the "head of a family," (Rev. St. U. S. § 2289,) which shows that the homestead entry is for the benefit of the whole family, and not for any single individual. The homestead under such laws is virtually a gift or donation by the general government to the family; and hence, when the title to such homestead is taken in the name of any single member of the family, there should not be much consideration required to vest the title to a fair proportion thereof in another member of the family. Landsbury in the present case entered and occupied his homestead for the benefit of himself and his wife, the present Mrs. Newkirk, and his daughter, the present Mrs. Marshall, and when he died it seems only fair and just that the homestead should be equally divided between the survivors. This was thought to be just by all the parties, and Landsbury so expressed it in his will; and after providing in his will for the division of his homestead equally between his wife and daughter, he then gave all his personal property to his wife, which, in all probability, he would not have done if he had not expected the real estate to be equally divided between them. And his widow and daughter constituted a family till long after the patent was issued. Under such circumstances, should there be much consideration required to pass from the daughter to the widow in order that such equitable division of the real property should be made? But it is not always necessary, in cases of the equitable transfer of title to land, that a consideration should pass from the person obtaining the land to the person from whom the land is obtained. Mr. Pomeroy, in his work on the Specific Performance of Contracts, (section 130,) uses the following language with respect to gifts or donations of real estate:

"\* \* \* The statute of frauds is satisfied by possession as a part performance, and the general doctrines of equity demand, in addition thereto, a valuable consideration. This latter demand is answered by the outlays, ex-

penditures, and labors of the donee in making the valuable improvements as a consequence of the gift. The doctrine, therefore, has been generally accepted that, when the donee takes possession and makes outlays upon valuable and substantial improvements in execution of the donation, or does other analogous acts which would render a revocation or a refusal to complete inequitable, a parol gift of land will be specifically enforced, since the labor and expenditures of the donee supply a valuable consideration, while the possession and betterments constitute a part performance which obviates the statute of frauds. This doctrine has been criticised in some American decisions, and wholly repudiated by others."

Mr. Pomeroy cites a large number of authorities supporting the proposition which he enunciates. See, also, *Galbraith v. Galbraith*, 5 Kan. 402; *Twiss v. George*, 33 Mich. 253.

Under the facts of this case, we do not think that the plaintiff can maintain her action. Under the United States homestead laws, and by a compliance with them, a person entering a homestead, or, in case of his death, his widow, or, in case of the death of both, his heirs or devisee, obtains a vested right in the homestead at the expiration of five years from the entry thereof, and upon making proper proof is entitled to a patent for the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have been issued, and may not be issued for years, he or she may contract and be contracted with concerning the land, or sell it, or convey the same, precisely the same as though the patent had already been issued. Equity, in order to do justice, and to protect the rights of parties, and to prevent frauds, will generally consider that as having been done which ought to be done. And in order to protect the rights of all parties, where a patent is due, but has not yet been issued, equity will consider such rights precisely the same as though the patent had in fact been issued on the very first day on which it ought to have been issued.

We might further say that in this case the burden of proof rested upon the plaintiff, and as the jury found a general verdict in favor of the defendants and against the plaintiff, everything will be considered as having been found in the defendants' favor and against the plaintiff, except such facts as the jury specifically found otherwise by their special findings; and, viewing the facts of the case in this manner, we think the taking of the possession of the land by Mrs. Marshall and her first husband under the parol agreements between them and Mrs. Newkirk, and the making of the lasting and valuable improvements on the land, not only took the case out of the statute of frauds, but also supplied a sufficient consideration for the property, and the acts of the parties since that time have enhanced and made stronger Mrs. Marshall's equities in and to the land.

The plaintiff also makes some points upon the introduction and exclusion of evidence, and the instructions given and refused; but we do not think that the court below committed any material error in these respects. Upon the entire facts of the case, taken as a whole,

we think Mrs. Marshall is entitled to the land in controversy; and believing that no material error has been committed in the case, and that justice and equity have been done, the judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 215)

**RITTER and another v. HOFFMAN.**

Filed April 9, 1886.

**1. JUDGMENT BY CONFESSION—ENTRY BY CLERK IN VACATION IN PENNSYLVANIA—ENFORCEMENT IN KANSAS.**

Under the laws of Pennsylvania, as they are shown to be by the parol and statutory evidence introduced on the trial, a valid personal judgment may be rendered in the state of Pennsylvania by the clerk of the court or prothonotary, in vacation, upon a penal bond and a written confession of judgment, for the full amount of the penalty, without summons or pleadings, but merely upon the request of the obligee of the bond; and such judgment will be enforced in Kansas to the extent of the actual damages suffered by the obligee.

**2. SAME—JURISDICTION OF PENNSYLVANIA COURT.**

Under the evidence in the case, an instrument in writing confessing judgment, executed in Pennsylvania, and by a resident of that state, gives to the courts of Pennsylvania such jurisdiction over the person of the defendant that a valid personal judgment, enforceable in another state, may be rendered against him merely upon his written confession and the request of the holder of the instrument; and this, without summons or pleadings or appearance by the defendant, and by the clerk of the court or prothonotary, in vacation, and although the defendant may, at the time of the rendition of the judgment, be absent from the state of Pennsylvania and a resident of another state.

**3. SAME—VALIDITY OF JUDGMENT OF ANOTHER STATE.**

A judgment rendered and entered in a state other than Kansas, in accordance with the laws of such other state, and valid there, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form, and under like circumstances, in Kansas, would be utterly void.

**Error from Saline county.**

In August or September, 1883, John W. Hoffman commenced an action in the district court of Saline county against Thomas C. Ritter and Abraham Ritter, to recover the sum of \$300, with interest and costs. On November 14, 1883, the plaintiff, with leave of the court, filed an amended petition, which reads as follows, omitting title and signature:

"The said plaintiff complains of said defendants, and says that at the times hereinafter mentioned the court of common pleas in and for the county of Columbia and state of Pennsylvania, was a court of general jurisdiction duly created and organized under the laws of that state; that on, to-wit, May 29, 1879, the said plaintiff, by the consideration of said court, recovered a judgment against said defendants for the sum of three hundred dollars, (\$300,) which said judgment was duly given and entered, and still remains in said court in full force and effect, in nowise reversed or annulled. A copy of said judgment is hereto attached, marked 'Exhibit A,' and made a part of this amended petition.

"Said plaintiff further says that said judgment was entered upon a certain indemnifying bond executed by said defendants to said plaintiff, a copy of which is hereto attached, marked 'Exhibit B,' and made part hereof, for the

purposes in said bond mentioned; that thereby said defendants bound themselves to indemnify and save harmless the said plaintiff from all suits, actions, damages, and costs that he might suffer, or that might accrue to him by reason of his proceedings under certain executions issued at the suit of said defendant T. C. Ritter against Barney Weiss and L. Weiss; that after the execution of said bond, and by virtue of said executions, said plaintiff was held liable by reason of his proceedings thereunder to one Hannah Weiss, who claimed to be the owner of the property levied on and mentioned in said indemnifying bond, and in an action duly commenced in said court of common pleas of Columbia county, Pennsylvania, on, to-wit, April 22, 1878, by said Hannah Weiss against this plaintiff, said Hannah Weiss, by the consideration of said court, duly recovered a judgment against plaintiff for the sum of \$168, and \$82.40 costs of suit, which said judgment was entered in said court on, to-wit, May 16, 1879, and was thereafter paid by plaintiff; that said sum of \$168 and cost of \$82.40 were the damages and costs against which said indemnifying bond was given. Said plaintiff says that said defendants have neglected and refused to reimburse him for said damages and costs, or to pay any part of said judgment for \$300 entered against them on said bond, and the same remains wholly unsatisfied.

"Wherefore, said plaintiff prays judgment against said defendants for the sum of \$250.40, with interest thereon from May 16, 1879."

Exhibit A, above mentioned, reads as follows:

"State of Pennsylvania, County of Columbia—ss.:

[Seal.]

"Among the records and proceedings of the court of common pleas in and for said county, *inter alia*, it is thus contained: 'Appearance docket entry to September term, 1879, No. 41: *John W. Hoffman*, 41, vs. *Thomas C. Ritter*, *Abraham Ritter*, 1.25, paid by plaintiff.' Judgment confessed on indemnifying bond for \$300, dated June 7, 1877, conditioned to indemnify and save harmless the above-named John W. Hoffman, sheriff, in a certain writ of *feri facias*, against Barney Weiss and L. Weiss at the suit of Thomas C. Ritter. Waiving exemption, inquisition, condemnation, and stay of execution. May 28, 1879, judg't is entered.

"WM. KRICKBAUM, Prot."

#### JUDGMENT DOCKET ENTRY.

DEFENDANTS.	PLAINTIFF.	NO.	TERM.	YEAR.	DATE OF LIEN.	NATURE.	AM'T.
Ritter, Thos. C., <i>et al.</i>	J. W. Hoffman.	41	Sept.	1879	28 May, 1879.	Indemnify-	\$300
Ritter, Abraham,	Same .....	41	"	1879	" " "	ing bond.	300

Exhibit B, mentioned in the petition, is an indemnity bond in the penal sum of \$300, and such as is described in the petition and in Exhibit A, and it also contains the following stipulation, to-wit:

"And we [Thomas C. Ritter and Abraham Ritter] do hereby confess judgment for the above-named sum, without stay of execution, waiving the three hundred dollars exemption law, waiving inquisition, with confession of condemnation on real estate."

The amended answer of the defendants is as follows, omitting title and signature:

"And the said Thomas C. Ritter and Abraham Ritter, defendants, now come, and for their amended answer to the petition of the said John W. Hoffman, plaintiff, allege and say (1) that they deny each and every allegation and averment in said petition contained. (2) And for a second and further cause

v.10p.no.7—37

of defense to said petition said defendants say that at the time when said proceedings were commenced as set forth in plaintiff's petition, and at the time when said supposed judgment was rendered as alleged in said petition, they, the said defendants, were citizens of the state of Kansas, and were residing therein; and said defendants further allege that they were not served with process in said case, and had no notice whatever of the pendency of said action, and that they never appeared thereto in person nor by attorney, and this they are ready to verify. (3) And for further cause of defense defendants allege and aver that said prothonotary of said court of common pleas had no jurisdiction or authority in law to enter said pretended judgment. (4) And for a fourth cause of defense defendants allege and aver that said court of common pleas had no authority in law to render said pretended judgment. (5) Said defendants further allege and aver that said pretended judgment is void in law. Wherefore defendants pray judgments for costs."

The reply of the plaintiff to this answer was a general denial.

The case was tried before the court, without a jury, on December 22, 1884, and the court found generally in favor of the plaintiff and against the defendants, and rendered judgment accordingly, in favor of the plaintiff and against the defendants, for \$348.50, and the defendants bring the case to this court.

*R. A. Lovitt*, for plaintiffs in error.

*Garver & Bond*, for defendant in error.

VALENTINE, J. In the year 1877, John W. Hoffman, who was the sheriff of Columbia county, Pennsylvania, held in his hands a writ of *fiere facias*, or, in other words, an execution, in favor of Thomas C. Ritter and against Barney Weiss and L. Weiss, under which execution he, the sheriff, levied upon certain property as the property of the defendants in the execution. Hannah Weiss claimed the property, and there being an uncertainty as to whom it belonged, Ritter and his father, Abraham Ritter, gave to the sheriff, Hoffman, an indemnity bond, with a confession of judgment for \$300. This bond and confession were executed June 7, 1877. At that time the Ritters resided in Columbia county, Pennsylvania. Afterwards, and some time in February, 1878, they removed to Saline county, Kansas, where they have resided ever since, and have not been in Pennsylvania since their removal to Kansas. The property levied on was sold by the sheriff, and the proceeds applied in partial satisfaction of the execution. The property, however, did not in fact belong to Barney Weiss and L. Weiss, or to either of them, but belonged to Hannah Weiss; and on April 22, 1878, she commenced an action against the sheriff and recovered a judgment against him for the value thereof, \$168, and costs of suit, \$82.40, which judgment Hoffman paid. This judgment was rendered on May 15, 1879. Afterwards, and on May 28, 1879, Hoffman, the sheriff, procured a judgment to be rendered in the court of common pleas of Columbia county, Pennsylvania, in his favor, and against Thomas C. Ritter and Abraham Ritter, on the indemnity bond, for \$300. Afterwards, and some time in August or September, 1883, Hoffman commenced this pres-

ent action in Saline county, Kansas, which involves in its determination the legal effect of the foregoing facts. Judgment was rendered in this action in favor of the plaintiff, Hoffman, and against the Ritters, on December 22, 1884, for \$348.50 and costs of suit, and on February 25, 1885, the defendants, as plaintiffs in error, brought the case to this court for review.

The plaintiffs in error (defendants below) claim that the judgment rendered against them and in favor of Hoffman in the common pleas court of Columbia county, Pennsylvania, on the indemnity bond and confession of judgment, is an absolute nullity, for several reasons which we shall hereafter mention; and further claim that upon the other facts of the case Hoffman is not entitled to any relief, for the reason that they do not constitute a cause of action; that the court erred in overruling the defendants' demurrer to the plaintiff's petition, and in permitting the plaintiff to amend his petition, and in overruling the defendants' motion for a new trial. On the other hand, the defendant in error (plaintiff below) claims that the judgment rendered in Pennsylvania on the indemnity bond and confession of judgment is valid; but, even if not, still that upon the other facts alleged in his amended petition he is entitled to recover, and that the court below did not err in any of the respects claimed by the defendants (plaintiffs in error.) A judgment rendered in Kansas in the manner and form in which the Pennsylvania judgment was rendered would be an utter nullity in Kansas; but, according to the evidence introduced on the trial in this case, such is not the case in Pennsylvania. According to the evidence introduced on the trial of this case, the judgment rendered in Pennsylvania is absolutely good and valid in the state of Pennsylvania; and, according to the decisions rendered in Pennsylvania, we would also think that the judgment is absolutely good and valid. A valid judgment may be rendered in Pennsylvania upon a confession, as this was, without summons or pleadings, and by the clerk of the court, in vacation, or by the prothonotary, as the clerk is called in Pennsylvania. It may be rendered merely upon the personal appearance and confession of the defendant himself, or upon the appearance and confession for the defendant by an attorney at law, duly authorized in writing to do so by the defendant, or upon a confession contained in a written instrument executed by the defendant, without any appearance by the defendant himself, or any person for him, but merely at the request of the holder of such instrument; and the judgment thus rendered may be upon a debt due, or for an agreed amount to secure a future or contingent liability, or unascertained and unliquidated damages. Among the numerous decisions rendered in the state of Pennsylvania concerning these matters we would cite the following: *Holden v. Bull*, 1 Pen. & W. 460; *Miller v. Howry*, 3 Pen. & W. 374; *Stewart v. Stocker*, 1 Watts, 135; *Pennock v. Copeland*, 1 Phil. 29; *Moore v. Hutchinson*, Id. 377; *M'Calmont v. Peters*, 13 Serg. & R. 196; *Cook v.*

*Gilbert*, 8 Serg. & R. 567; *Ely v. Karmany*, 23 Pa. St. 314; *McClure v. Roman*, 52 Pa. St. 458; *Shenk's Appeal*, 33 Pa. St. 371; *Parmen-tier v. Gillespie*, 9 Pa. St. 86; *Ter-Hoven v. Kerns*, 2 Pa. St. 96; *Sheble v. Cummins*, 1 Brown, 253.

We think the only question for us to determine in this case is whether the judgment rendered in Pennsylvania is equally as good in Kansas as it is in Pennsylvania. If it was rendered without jurisdiction personally of the defendants, of course it would be void in Kansas; but if it was rendered with such jurisdiction, then it would be equally as good and valid in Kansas as it is in Pennsylvania; for, under section 1, article 4, of the federal constitution, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The defendants claim that the judgment is void in Kansas, for the following reasons:

"The record made by the prothonotary is designated, 'Judgment Docket Entry.' It is entered as at the September term, 1879. No summons was ever issued, and no appearance was ever made by either of the defendants. No judgment was ever rendered by the court itself. No finding was ever made by the court as to the amount due Hoffman, if anything, on said bond. The action of the prothonotary was never ratified and confirmed by the court at or during the subsequent September term. As far as appears from the record, and as far as the Pennsylvania law is concerned, upon which defendant in error relies, he was at liberty to take judgment on said bond the next day after it was executed, and it would have been just as valid in our courts as the one sued on. \* \* \* It does not appear from the face of the instrument the amount that is due; in fact, it does not appear from the instrument that any amount was due at the time it was filed by the prothonotary."

The defendants further claim that the judgment is void in Kansas, for the reason that it was rendered for the amount of a penal bond given to secure a future and contingent liability, and to secure at most only unascertained and unliquidated damages which had not yet accrued; also for the reason that these damages were not proved at the time when the judgment was rendered; and also for the reason that the defendants were in Kansas, and not in the state of Pennsylvania, at the time when the judgment was rendered. The question, however, as to how far these matters may affect the validity of the judgment in Pennsylvania, or as to whether they can have the effect to render the judgment invalid in Pennsylvania, has been completely answered by the evidence introduced on the trial of this case. The judgment was shown by the evidence, parol and statutory, to be valid in Pennsylvania; and, while it seems that judgments may sometimes be rendered in Pennsylvania before the ultimate liability of the defendant occurs, and for more than the amount of that liability, yet the courts of Pennsylvania seem to be ever watchful that no injustice shall be done. It seems that the courts there hold that whatever in equity and good conscience ought to be a satisfaction of such judgments will in fact be a satisfaction thereof; and therefore, whenever a judgment is rendered on a penal bond, as in this case,

for the full amount of the penalty, the plaintiff holds the judgment, in effect, only as a security, and may collect on the judgment only his real and actual damages. At common law, as contradistinguished from equity, judgments were rendered on penal bonds for the full amount of the penalty. 2 Bl. Comm. 341; 1 Tidd, Pr. 585. And in this very case the district court of Saline county, Kansas, rendered judgment only for the plaintiff's real and actual damages, including interest, and not for the full amount of the penalty of the bond, with interest, nor for the full amount of the Pennsylvania judgment, with interest. Is the Pennsylvania judgment valid to this extent in Kansas? This question depends solely, as we think, upon the further question whether the court of Columbia county, Pennsylvania, which rendered the judgment, had at the time sufficient jurisdiction of the persons of the defendants to render the judgment.

In several of the states, judgment may be rendered in vacation by the clerks of the courts, or by the prothonotaries, as they are called in Pennsylvania, and in several of the states judgments may be rendered upon instruments in writing, executed by the defendants as this was, confessing judgment; and in Pennsylvania, and perhaps in some of the other states, and at common law, judgments may be rendered on penal bonds for the full amount of the penalty. All this is shown to have been regularly and properly done, under the laws of Pennsylvania, in the present case. Under the laws of Pennsylvania, as shown by the evidence, parol and statutory, we think the Pennsylvania court rendering the judgment in the present case had jurisdiction of the persons of the defendants. It is not necessary in all cases that a summons should be issued and served upon a party to the action in order to give the court jurisdiction over him personally. A summons is never issued against a plaintiff, and still the court has the same jurisdiction of the plaintiff that it has of the defendant. A voluntary appearance in the court is all that is required of either the plaintiff or the defendant. Neither is it necessary that the appearance of the party should be in person. It may be by attorney. In many cases neither the plaintiffs nor the defendants ever appear personally in the court, and yet the court may have ample jurisdiction of both. A plaintiff, by the voluntary appearance of his authorized counsel, may give such personal jurisdiction of his person to the court that a personal judgment rendered against him would be valid everywhere in the United States, although he had never in fact made any personal appearance in the court, nor even been in the state where such court was held or such judgment rendered. He has given such jurisdiction by simply authorizing an attorney to appear for him, and by the appearance of such attorney in the case.

In the present case, while the defendants were residents of the state of Pennsylvania, they executed an instrument in writing, which under the laws of Pennsylvania gave any proper court authority to take such jurisdiction of their persons as to render a valid per-

sonal judgment against them. And by leaving the state of Pennsylvania without attempting to revoke or cancel that instrument, we do not think that they so revoked the power of the courts of Pennsylvania that they could not afterwards take jurisdiction of the defendants' persons, and render a valid personal judgment against them. And here we might say that when the defendants executed the instrument in writing, confessing judgment, and upon which the Pennsylvania judgment was rendered, they were bound to know what the laws of Pennsylvania were, and such laws became a part of their contract, and by their contract they surrendered jurisdiction of themselves personally to the courts of Pennsylvania. A Pennsylvania judgment similar to the one in question in this case has been held to be valid in Iowa. *Crafts v. Clark*, 38 Iowa, 237. See, also, *Patterson v. State*, 2 G. Greene, 493. About the only differences between the Pennsylvania judgment held to be valid in Iowa and the one now in question are that the Pennsylvania judgment held to be valid in Iowa was rendered upon the authority given, in writing, *to any attorney of any court of record in Pennsylvania to enter judgment*, and was rendered upon a *promissory note nearly five years before it was due*, and there is nothing to show *where the defendants were at the time*, whether in Pennsylvania or elsewhere; while the judgment in question in this case was rendered upon a *written confession of judgment* by the defendants themselves, upon a penal bond, *after condition broken*, and the defendants, at the time the judgment was rendered, *were in Kansas*, and resided in Kansas. These differences are certainly not sufficient to authorize a holding that the judgment in question in this case is invalid, if it was rightly held that the judgment in question in the Iowa case was valid. We think, under the facts of this case, the Pennsylvania judgment must be held to be valid; and we further think that even if it were invalid, still that the facts alleged in the plaintiff's amended petition constitute a good cause of action, and authorize the judgment that was in fact rendered by the court below.

Whether the court below erred in overruling the defendants' demurrer to the plaintiff's original petition is wholly immaterial, for the plaintiff subsequently filed an amended petition which we think stated a good cause of action. And we do not think that the court below erred in overruling the defendants' motion for a new trial. Indeed, we do not think that the court below committed any material error. The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 178)

## McCROSSEN v. HARRIS and others.

Filed April 9, 1886.

## TAXATION—LIEN—JUDGMENT CREDITOR.

Where a mortgage of real estate is merged into a judgment, which includes all the taxes due upon the land at the date of its rendition, the payment, by the judgment creditor, of taxes accruing on the premises after the judgment, will not constitute a separate and independent lien on the land, which can be enforced by action after the judgment debtor has satisfied the judgment, interest, and costs.

Error from Wyandotte county.

*D. B. Hadley*, for plaintiff in error.

*N. Cree*, for defendants in error.

HORTON, C. J. Edmond Harris and his wife, Maria, on June 2, 1880, executed a mortgage to R. D. McCrossen upon lots 3 and 4, in block 94, in the city of Wyandotte, in this state, to secure the payment of a note for \$275, with interest. On January 3, 1883, McCrossen obtained a judgment of foreclosure of the mortgage, and in the judgment the taxes then due on the premises were decreed to be a lien thereon. It was also provided in the decree that if McCrossen should pay such taxes, he should be repaid out of the sale of the property. Appraisement having been waived in the mortgage, the sale, under the decree of foreclosure, was stayed six months. A sale was made December 3, 1883, but on account of informalities this was set aside. On December 20, 1883, McCrossen paid \$41.58 for taxes upon the premises upon which the judgment was a lien. On February 15, 1884, he filed his *præcipe* for an *alias* order of sale upon the judgment, but before it was placed in the hands of the sheriff Edmond Harris paid off the judgment, interest, and costs, and all taxes, up to and including those assessed for 1882, but refused to repay plaintiff the taxes of 1883. This action was brought to recover the taxes so paid by him, and to declare the same a lien upon the premises. The premises were subsequently sold to George Gruble, and Gruble and his wife mortgaged the property to Adeline Crane to secure the sum of \$500. The petition charged that George Gruble and Adeline Crane took their conveyances with full knowledge of the alleged lien of McCrossen. At the time that the plaintiff paid the taxes, the mortgage had been extinguished by being merged into the judgment; therefore the taxes were not a lien in connection with the mortgage; therefore no action can be maintained to recover these taxes upon any of the covenants of the mortgage, nor upon the provisions of section 148, c. 107, Comp. Laws 1879, permitting a mortgagee to pay taxes where the mortgagor fails or neglects so to do. *Vincent v. Moore*, 17 N. W. Rep. 81; *Hitchcock v. Merrick*, 18 Wis. 375; *Johnson v. Payne*, 11 Neb. 269; S. C. 9 N. W. Rep. 81.

After the judgment was rendered, the amount thereof was a specific lien upon the real estate described therein. Under some cir-

cumstances, perhaps, a party might pay the taxes for the protection of his lien, and for such payment equity might give him a lien in connection with the judgment; but such a case is not presented. All of the taxes prior to 1883 were included in the judgment. For the protection of his judgment lien, it was not necessary to pay the taxes of 1883. Section 56, c. 107, Comp. Laws 1879, provides that, where any real estate is sold at judicial sale, the court shall order all taxes and penalties thereon against the land to be discharged out of the proceeds of the sale. Therefore, if the plaintiff had not paid the taxes of 1883, and if a sale had been made of the premises, the taxes would have been satisfied out of the proceeds. Section 56, c. 107, *supra*. If the plaintiff had not paid the taxes at the time the judgment debtor paid the judgment and costs, the taxes would no longer have been of any concern to him. There is no allegation in the petition that the real estate was insufficient security for the judgment lien, or any other special facts set forth showing the necessity of the payment of the taxes, after judgment, to protect the judgment lien. Under the circumstances, we must regard the payment of the taxes by plaintiff as voluntary, and such payment will not support an action to constitute the taxes so paid a separate and independent lien on the land. It seems very unjust that the plaintiff should pay these taxes, and not be able to recover the amount thereof; but as the payment must be regarded as voluntary, the law does not give a remedy.

The judgment of the district court will be affirmed.

(All the justices concurring.)

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(35 Kan. 93)

GARDNER v. RISHER.

Filed April 9, 1886.

1. SET-OFF AND COUNTER-CLAIM—NOTE SECURED BY CHATTEL MORTGAGE—UNLIQUIDATED DAMAGES.

Unliquidated damages arising from contract may constitute a set-off against a note secured by a chattel mortgage; and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor asserting such unliquidated damages, and pleading the same in an action founded upon the note and mortgage.

2. SAME—ASSIGNMENTS—CROSS-DEMANDS.

When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a set-off could have been set up, neither can be deprived of the benefit of such set-off by the assignment of the other. Section 100, Civil Code.

JOHNSTON, J., dissenting.

Error from Butler county.

This case was originally commenced and tried before a justice of the peace. The following is the plaintiff's bill of particulars, omitting name of justice and title:

"Plaintiff, Israel D. Risher, complains of the defendant, John R. Gardner, and says that the plaintiff is the owner of the following described and valued property, to-wit: one red cow, with some white in the face or forehead, said cow being a little more than five years old, and being of the value of thirty-five dollars; that said plaintiff is entitled to the immediate possession of said cow; that said property is wrongfully detained from said plaintiff by said defendant, John R. Gardner; that said property was not taken in execution, or on an order or judgment against said plaintiff, or for payment of any tax, fine, or amercement assessed against said plaintiff, or by virtue of any order issued in replevin, or any other mesne or final process; that by reason of such unlawful detention of said property by said defendant this plaintiff has sustained damages in the sum of forty-five dollars. Wherefore plaintiff sues, and prays judgment against said defendant for the return of said property, and for said damages, and for all other proper relief in the premises."

An appeal was taken to the district court, and trial had January 22, 1885, by the court, the parties waiving a jury. Upon the request of defendant, the court made and filed the following findings of fact:

"(1) On the twenty-fifth day of February, 1884, plaintiff made and delivered to Herman Litzkie two notes for fifty-five dollars, due in two and six months, respectively, and bearing interest at 12 per cent. per annum from date; and at the same time, to secure the payment of these two notes, made and delivered to said Herman Litzkie a mortgage upon the property replevied in this action, being a cow; which mortgage provided that if the said indebtedness should be paid when due the mortgage should become void; and further provided that if the indebtedness was not paid when due, the mortgagee might take the property, and sell it at public or private sale, and that until default should be made the property should remain in the possession of the plaintiff. (2) The plaintiff made payments upon said indebtedness as follows: On August 4, 1884, twenty-eight dollars; on September 29, 1884, twenty dollars; and on October 4, 1884, thirteen 68-100 dollars. (3) On or about the twentieth day of February, A. D. 1884, the plaintiff and said Herman Litzkie entered into a contract whereby Litzkie agreed to furnish to plaintiff one hundred and fifteen head of cattle, to be herded by plaintiff during the herding season of 1884; and to furnish to plaintiff a pony for herding purposes during such season, and furnish the necessary salt with which to salt said cattle during said season; and to pay plaintiff for herding said cattle the sum of fifteen cents per head per month for said season, and the plaintiff agreed to herd said cattle during said season for said compensation; that the herding season opened during the month of May, in 1884, and continued for about five months; that the plaintiff procured the use of extra pasture land, and made other necessary arrangements for the herding of said cattle for said season; that plaintiff had a son capable of herding said cattle in connection with all other cattle plaintiff was herding for said season; that plaintiff engaged in herding cattle during the herding season of 1884, and could have herded said cattle of Litzkie under said contract without additional expense; that the said Herman Litzkie wholly failed to furnish plaintiff any cattle to be herded during any part of said season under said contract, or otherwise; that the plaintiff sustained damages by reason of the breach of said contract on the part of said Litzkie in the sum of eighty-five dollars; that if said cattle had been furnished by Litzkie as agreed, the contract of herding by plaintiff would have been fulfilled before the taking of the property hereinafter stated. (4) That on or about the sixth day of October, 1884, the said Herman Litzkie took possession of said mortgaged property under, and claiming the right so to do by virtue of, said mortgage; that defendant, Gardner, was present with Litzkie at the time of such taking said property. (5) That at

the time Litzkie took said mortgaged property as aforesaid in the presence of defendant, Gardner, the plaintiff notified Litzkie that he considered said mortgage debt fully paid, and demanded the surrender of said notes and mortgage. (6) That said Litzkie, claiming to act under the provisions of said mortgage, sold said property to defendant at private sale to satisfy said mortgage debt. (7) That the said property is of the value of thirty dollars. (8) That the value of the use of said property from the commencement of this action until this trial is the sum of ten dollars. (9) That except as affected by said mortgage, and the proceedings thereunder, the plaintiff was the owner of said property at the time of this action."

And thereon the court made the following conclusions of law:

"(1) That the taking of the property by said Herman Litzkie under said mortgage was unauthorized and wrongful; (2) that the sale of said property by said Herman Litzkie to defendant, John R. Gardner, was unauthorized, and conveyed no title; (3) that the plaintiff is entitled to recover of the defendant in this action the property replevied, and the sum of thirty dollars, in case a return of said property cannot be had, and the plaintiff is further entitled to recover of the defendant the sum of ten dollars, his damages for the detention of said property."

The defendant excepted to the findings of fact and conclusions of law, and afterwards filed a motion for judgment upon the findings of fact, which was overruled. Subsequently he filed a motion for a new trial, which was also overruled. Judgment was entered upon the findings in favor of the plaintiff that he recover from the defendant the personal property described in the bill of particulars, and, in case a return of the property could not be had, that he recover \$30 for the value of the property. It was also adjudged that the defendant pay all costs. To the rulings and judgment the defendant excepted, and brings the case here.

*T. O. Shinn*, for plaintiff in error.

*A. L. L. Hamilton* and *C. A. Leland*, for defendant in error.

HORTON, C. J. This action originated in a justice's court. Subsequently it was appealed to the district court, and there, upon the trial, the parties waived a jury, and submitted the case to the court, with the request that the court find the facts specifically, and state its conclusions of law thereon. This was done. The facts found are substantially these: On February 25, 1884, Israel D. Risher, plaintiff below, executed to Herman Litzkie two notes for \$55, due in two and six months, respectively, and bearing interest at 12 per cent. per annum from date. To secure the payment of these notes, Risher executed to Litzkie a mortgage upon a cow,—the property replevied in this action,—which provided, among other things, that if the indebtedness was not paid when due the mortgagee might take the property and sell it at public or private sale. It was further provided therein that until default should be made the property should remain in the actual possession of the mortgagor. Risher paid \$61.68 upon the notes. On February 20, 1884, Risher and Litzkie entered into a con-

tract whereby Litzkie agreed to furnish to plaintiff 115 head of cattle to be herded by the plaintiff during the herding season of 1884. Litzkie wholly failed to furnish any cattle to be herded under his contract, and Risher sustained damages by reason of the breach thereof in the sum of \$85. On October 6, 1884, after such damages had accrued to Risher, Litzkie took possession of the cow embraced in the mortgage, claiming the right so to do by virtue thereof. At this time Risher notified Litzkie that, on account of the damages which had accrued to him by reason of the breach of the contract before mentioned, the mortgage debt was fully satisfied; and thereupon he demanded the surrender of the notes and mortgage. Litzkie refused to assent to the claim of Risher, but sold the property, which was of the value of \$30, at private sale, to John R. Gardner, the defendant below, who was present when Litzkie took the mortgaged property, and had notice from Risher that he was the owner of the cow, and that the mortgage debt was satisfied as above stated. Subsequently, Risher brought his action in replevin against Gardner to obtain possession of the cow.

The \$61.68 which Risher had paid upon the notes secured by the mortgage, together with the \$85 claimed by him as damages by reason of the breach of the contract upon the part of Litzkie, greatly exceeded the balance due upon the notes and mortgage. The question in the case, therefore, is whether Risher had the right to offset against the notes and mortgage the damages he claimed against Litzkie. We think he had the right to offset his damages, and that Litzkie acted at his peril in taking the cow. The only claim he had to the cow was under the mortgage, and his interest in the property depended upon the amount due him from the mortgagor, after deducting all payments and legal offsets. His claim, therefore, was founded on contract, and in this state any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, constitutes a set-off against any action founded on contract. Sections 94, 98, Civil Code; *Stevens v. Able*, 15 Kan. 584. The law relating to set-offs in this state has been broadened to embrace claims not recognized as such by the laws of many other states; hence the cases of *Gates v. Smith*, 2 Minn. 30, (Gil. 21;) *Keightley v. Walls*, 24 Ind. 205; and *Warner v. Comstock*, 22 N. W. Rep. 64,—do not apply.

Gardner purchased the cow with notice of Risher's rights. His defense, or rather his claim, in the action was founded upon the notes and mortgage executed by Risher to Litzkie. If nothing was due upon the notes and mortgage, or if Risher had a valid offset to the same at the time Litzkie took possession of the cow, then Gardner obtained no title or right thereto, if Risher's set-off was relied upon and pleaded by him in any action or proceeding founded upon the notes and mortgage.

Section 100 of the Civil Code provides:

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other." *Leavenson v. Lafontaine*, 3 Kan. 523; *Turner v. Crawford*, 14 Kan. 499; *Sponenbarger v. Lemert*, 23 Kan. 55.

So, here, Risher cannot be deprived of the benefit of his set-off on account of the sale or transfer of the mortgaged property to Gardner, who had full knowledge of Risher's set-off at the time he purchased.

The judgment of the district court will be affirmed.

VALENTINE, J., concurring.

JOHNSTON, J. I do not concur. Under our statutes a set-off can only be pleaded in an action founded on contract. Civil Code, § 98. This was an action of replevin, which is in the nature of a tort, and is founded upon the wrong of the defendant, and not upon contract. I think, therefore, that the adjudication of a claim between the plaintiff and defendant's vendor in this action was erroneous.

(35 Kan. 156)

#### MORRIS v. COOPER and another.

Filed April 9, 1886.

##### 1. GUARDIAN AND WARD—BOND—STATUTE.

From the language of the bond sued on in the present case, and other facts, *held*, that the bond was given under section 7 of the act relating to guardians and wards, and not under section 15 of said act.

##### 2. SAME—GUARDIAN'S SALE—OBJECT OF BOND.

A guardian's bond, executed under section 7 of the act relating to guardians and wards, is intended as a security only for the proper use of the personal estate of the ward, and the rents and profits of his real estate, and is not intended as a security for the proper use of the purchase money received by the guardian on the sale of the real estate of the ward, another bond being required to be given for that purpose by section 15 of said act.

Error from Coffey county.

*E. N. Connal*, for plaintiff in error.

*George E. Manchester*, for defendants in error.

VALENTINE, J. This was an action brought by Alice N. Cooper and Caleb T. Noell against Isabella Holland, Augustine Holland, and John Morris on a guardian's bond. Judgment was rendered in favor of the plaintiffs, and against the defendants, and the defendant John Morris, as plaintiff in error, brings the case to this court for review, making Alice N. Cooper and Caleb T. Noell the defendants in error.

It appears from the evidence in the case that some time in November, 1861, Caleb T. Noell died, leaving a widow, Isabella Noell, now Isabella Holland, and a daughter, Alice N. Noell, now Alice N. Cooper, and soon afterwards, to-wit, on March 27, 1862, a son, Caleb T. Noell, was born. Caleb T. Noell, deceased, also left a small amount of real

estate, but whether he left any personal property or not is not shown. On May 18, 1870, Isabella Holland, as principal, and Augustine Holland, her husband, and John Morris, as sureties, executed the following bond, and Isabella Holland took and subscribed the following oath, to-wit:

**"GUARDIAN'S BOND.**

"Know all men by these presents: That we, Isabella Holland, as principal, and ——— and Augustine Holland, as sureties, are held and firmly bound unto the state of Kansas in the sum of five hundred dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, by these presents; upon the condition that whereas, the said Isabella Holland has been appointed by the probate court of Coffey county, Kansas, guardian of the persons and estate of Alice N. Noell and Caleb T. Noell, children and heirs of Caleb T. Noell, deceased, minors, of Coffey county, Kansas, under the age of eighteen years: Now if the said Isabella Holland shall faithfully discharge all of her duties as such guardian according to law, then the above bond to be void, otherwise to remain in full force in law.

"In witness whereof we hereunto subscribe our names this thirteenth day of May, A. D. 1870.

"ISABELLA HOLLAND.

[Seal.]

"JOHN MORRIS.

[Seal.]

"AUGUSTINE HOLLAND."

[Seal.]

"*State of Kansas, Coffey County—ss.:* I, Isabella Holland, do solemnly swear that I will faithfully and impartially, and to the best of my ability, discharge all the duties that shall devolve upon me as guardian of the persons and estate of Alice N. Noell and Caleb T. Noell, children and heirs of Caleb T. Noell, deceased, minor heirs of Caleb T. Noell, deceased.

"ISABELLA HOLLAND.

"Sworn to and subscribed before me this thirteenth day of May, A. D. 1870.

"JOHN M. RANKIN, Judge."

This bond and oath were filed in the office of the probate judge on May 18, 1870, and on the same day Mrs. Holland was, by the probate judge, appointed guardian for the property of the minor heirs of Caleb T. Noell, deceased, by the following order, to-wit:

"IN VACATION, May 18, 1870.

"And now comes Isabella Holland, and represents that she is the mother of Alice N. Noell and Caleb T. Noell, minors under the age of fourteen years, and that the said heirs have property which may depreciate in value or remain unproductive if a guardian be not appointed; and the court being satisfied of the fitness of said Isabella Holland to act as guardian of the said wards, it is ordered that letters of guardianship issue accordingly to the said Isabella Holland, she having filed a sufficient bond as such guardian.

"JOHN M. RANKIN, Probate Judge."

On the next day, to-wit, May 19, 1870, Mrs. Holland filed an application in the office of the probate court, asking permission to sell the aforesaid real estate which had descended to the said minor children as the heirs of Caleb T. Noell, deceased, which application was granted by the probate court. No other or additional bond was ever given by Mrs. Holland, but nevertheless, on June 6, 1870, as guardian, she sold said real estate to Joseph Newlan for the sum of \$250,

which sale was approved by the probate court, and on the same day Mrs. Holland executed to Newlan a guardian's deed for the land. On June 8, 1876, Mrs. Holland reported that she had in her hands, belonging to her wards, \$258, principal and interest, all being the proceeds of said sale of real estate. On May 21, 1883, she further reported to the probate court that she had in her hands, belonging to her wards, \$361.64, this sum being the said \$258, and interest. This was her last report to the probate court. These reports were approved by the probate court. It does not appear that Mrs. Holland ever received anything belonging to her wards except the proceeds of the sale of said real estate, and interest thereon. Some time after the time when this last report was made, but just when is not shown, this action was commenced. It was tried on July 24, 1884, before the court and a jury, and the jury rendered a verdict in favor of the plaintiffs, and against the defendants, for \$361.64, and to reverse this judgment the defendant Morris, as plaintiff in error, now brings the case to this court.

This action was on the aforesaid bond, and the principal question involved in the case is whether there was any such breach of the bond as would render the sureties liable thereon. The plaintiffs below, defendants in error, claim that there was, while the defendant Morris, plaintiff in error, claims that there was not. The statutes providing for the giving of guardians' bonds (sections 7 and 15 of the act relating to guardians and wards) read as follows:

"Sec. 7. Guardians appointed to take charge of the property of the minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate, of the minor, conditioned for the faithful discharge of their duties as such guardian according to law. They must, also, take an oath of the same tenor as the condition of the bond."

"Sec. 15. Before any such sale or mortgage [of real estate] can be made or executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold, or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duties in this respect, and account for and apply all moneys received by him under the direction of the court."

The first question presented in this case is whether the bond in controversy was executed under section 7 of the act relating to guardians and wards, or under section 15 of said act. We think it was executed under section 7. We would think so from the language of the bond itself; also the oath required to be taken, by section 7, by a newly-appointed guardian, is attached to the bond, which would not be the case if the bond were given under section 15, which does not require that any oath should be taken. It was executed before Mrs. Holland was appointed guardian, and not afterwards. It was filed on the day on which she was appointed guardian, and the appointment seems to have been made in pursuance of the filing of such bond; and at the time when the bond was executed and filed

no application had been made for the sale of any of the real estate of the minor children, and the bond does not mention real estate; and, whatever may have been the intention of Mrs. Holland, there is nothing tending to show that at that time any of the other parties, or the probate court, had in contemplation the sale of any of such real estate. There is certainly nothing that tends to show that Morris, when he executed the bond, had the slightest hint or intimation that any of the real estate was ever to be sold. We therefore think that the bond was given under section 7 of the act relating to guardians and wards, and not under section 15. The question then arises, was there any breach of such bond? This question, we think, must be answered in the negative. This identical question has been decided under a similar statute by the supreme court of Indiana. That court held that a bond given by a guardian on assuming the duties of his trust is designed only to secure the faithful appropriation and investment of the personal estate of the ward, including the rents of the real estate, and that the sureties on such bond are not responsible for the misapplication of money received on the sale of real estate, the statutes requiring that another bond should be given as a security for the proper use of the purchase money received on the sale of real estate. *Warwick v. State*, 5 Ind. 350. Also, to the same effect, see *Williams v. Morton*, 38 Me. 47. And in Wisconsin it is stated as a general rule "that where an officer is required to perform a duty which is special in its nature, and he is required to give a special bond for the faithful performance of such duty, in the absence of any declaration that the general bondsmen shall be liable, no such liability attaches," (*Milwaukee Co. v. Ehlers*, 45 Wis. 281, 293;) and the Wisconsin court cites a large number of authorities in support of the foregoing proposition. Under section 7 of the act relating to guardians and wards the guardian has no right to sell real estate. He simply takes charge of the personal property, and the rents and profits of the real estate, and this is all that the bond is intended to cover. If it should be desired that the guardian should sell any portion of the real estate for his ward, he must first procure a special order for that purpose; and he must then, before he sells any of the real estate, execute another bond to the satisfaction of the probate court, in the penal sum of at least double the value of such real estate, and the sureties on the general bond given at the time of the appointment of the guardian will have a right to suppose that the guardian will never be permitted to sell any of the real estate before he executes and files the special bond required by section 15.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

(All the justices concurring.)

(35 Kan. 120)

## BECKMAN and another v. SIKES.

Filed April 9, 1886.

## MORTGAGE—FORECLOSURE—SALE—RIGHT OF PURCHASER—CROPS.

After the foreclosure of a mortgage upon a tract of real estate, the mortgagor planted a crop of corn thereon, which was immature and growing when the land was sold pursuant to the decree of foreclosure. One day before the sale of the land the mortgagor sold the corn to another, who claimed the same as against the purchaser of the land. *Held*, that the lien of the mortgage and decree of foreclosure attached to the growing crop as well as to the land, and that the purchaser of the land under the decree will be entitled to the growing and unsevered crop in preference to the vendee of the mortgagor, unless there was a reservation of the crop, or unless the purchaser had waived his right to claim the same.<sup>1</sup>

Error from Riley county.

*Green & Hessin*, for plaintiffs in error.

*R. B. Spilman and Charles N. Russell*, for defendant in error.

JOHNSTON, J. This action was brought by W. H. Sikes to recover the value of a crop of corn and oats alleged to have been converted by the plaintiffs in error, John F. and C. H. Beckman, who were defendants below. It appeared upon the trial that one C. M. Baker was the owner of the land upon which the crop was grown. He had mortgaged the land, and the conditions of the mortgage having been broken, it was foreclosed on December 15, 1883. There being a stipulation in the mortgage for a waiver of appraisalment, it was decreed that the land should be sold without appraisalment at the expiration of six months from the date of the decree. On June 19, 1884, an order of sale was issued under the decree, and after due notice a sale of the premises was made on August 1, 1884, to one H. C. Crump. The sale was subsequently confirmed, and on September 5, 1884, a deed was made by the sheriff to the purchaser. After the decree of foreclosure, but before the sale was made, Baker planted and cultivated a crop of oats and corn upon the premises decreed to be sold. On July 31, 1884, just one day prior to the sale of the premises by the sheriff, Baker sold, or attempted to sell, the crop to Sikes; and it was under this purchase that he claimed the oats and corn, the value of which he seeks to recover in this action. The Beckmans claimed under Crump, from whom they purchased the land on which the crops were grown. At the trial the plaintiffs in error contended that crops grown upon the land at the time it was sold and conveyed passed with the land to H. C. Crump, the purchaser at the sheriff's sale. This view was rejected by the trial judge, and instead he directed the jury that the purchaser at the sheriff's sale was not entitled to the crop grown upon the land where such crop had been sold by the judgment debtor prior to the day of sale, and that if they believed from the evidence that Sikes purchased the oats and corn from C. M. Baker prior to August 1, 1884, their verdict should be for the plaintiff.

<sup>1</sup>See note at end of case.

For this ruling the judgment obtained by the plaintiff below must be reversed. The oat crop had matured and was harvested prior to the sheriff's sale, but the corn crop was yet immature and unsevered. In *Smith v. Hague*, 25 Kan. 246, a case where a crop was planted upon the land after a judgment had been rendered decreeing a foreclosure of the vendor's lien against the land, and ordering that it be sold to satisfy such lien, and under such order of sale the land was sold before the crop was ripe or harvested, it was ruled that the crops which were then growing upon the land, and not reserved in the order of sale, or at the sale, passed by the sale and deed of conveyance of the sheriff. The fact that the mortgagor or judgment debtor sold the growing crop prior to the sheriff's sale of the land, as it is claimed was done here, does not vary the case, because he could not pass a title greater than his own, and therefore Sikes obtained no better right to the growing crop than Baker had or could give. Of course the mortgage as well as the judgment decreeing a foreclosure was only a lien upon the land, and did not confer title. The title and right of possession remained in the mortgagor until the sale and conveyance of the land. Until that time he was entitled to the use of the land, and to all the crops grown thereon that had ripened and were severed. The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased such crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure was notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would, ordinarily, get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation or waiver of the right to the crop at such sale, the title to the same would pass with the land. *Smith v. Hague*, *supra*; *Chapman v. Veach*, 32 Kan. 167; S. C. 4 Pac. Rep. 100; *Garanflo v. Cooley*, 33 Kan. 137; S. C. 5 Pac. Rep. 766; *Jones, Mortg.* §§ 676, 780, 1658; 1 Washb. Real Prop. (3d Ed.) 124; *Jones v. Thomas*, 8 Blackf. 428; *Downard v. Groff*, 40 Iowa, 597; *Shepard v. Philbrick*, 2 Denio, 174; *Lane v. King*, 8 Wend. 584; *Gillett v. Balcom*, 6 Barb. 370; *Scriven v. Moote*, 36 Mich. 64; *Howell v. Schenck*, 24 N. J. Law, 89; *Pitts v. Hendrix*, 6 Ga. 452; *Rankin v. Kinsey*, 7 Bradw. 215; *Sherman v. Willett*, 42 N. Y. 146; 1 Schouler, Pers. Prop. 133.

It follows that the instruction given was erroneous, and therefore the judgment will be reversed, and the cause remanded for another trial.

(All the justices concurring.)

v.10p.no.7—38

## NOTE.

Crops fully matured do not pass by a sheriff's deed upon foreclosure sale of the land. *Everingham v. Braden*, (Iowa,) 12 N. W. Rep. 142.

A mortgagor, and those claiming under him, having the right to the possession and use of the mortgaged property after foreclosure sale until his title is divested by due course of law, may cut and remove all crops growing upon the mortgaged premises, in the usual course of good farming, until the confirmation of the mortgage sale. *Allen v. Elderkin*, (Wis.) 22 N. W. Rep. 842.

(35 Kan. 167)

STATE *ex rel.* EDGERLY, Co. Atty., etc., v. BROWN, Probate Judge, etc.

Filed April 9, 1886.

## COURT—PROBATE JUDGE—FAILURE TO COUNT COUNTY FUNDS.

The duties imposed upon a probate judge by the provisions of section 8, c. 8, Sp. Sess. Laws 1874, concerning the examination and counting of the funds in the hands of a county treasurer, are distinct from the duties pertaining to the judicial office, and are somewhat in the nature of a new office. Therefore the right of a probate judge to enjoy the powers and emoluments of his office as probate judge does not depend upon a faithful discharge of the duties so imposed by said statute, and if he fails or neglects to make the examination and count required by the statute, he does not thereby forfeit his office as probate judge.

Original proceedings in *quo warranto*.

On November 11, 1885, the state of Kansas *ex rel.* A. W. Edgerly, county attorney of Coffey county in this state, filed the following petition against C. O. Brown, probate judge of said county:

"The state of Kansas, on the relation of A. W. Edgerly, county attorney of Coffey county, Kansas, and by virtue of the authority vested in him by law, gives the court here to understand and be informed that at the general election of the year A. D. 1884, and on the fourth day of November, 1884, said defendant, C. O. Brown, was duly elected to the office of probate judge of Coffey county, Kansas, for the term of two years, to commence on the second Monday of January, 1885; that subsequently the said defendant duly qualified for said office, and on the second Monday of January, 1885, duly entered upon the discharge of the duties of his said office of probate judge of said county; and that ever since said second Monday of January, 1885, said C. O. Brown has been acting as probate judge of said county; that on and prior to the first day of January, 1885, and continuously since the first day of January, 1885, till after the twenty-fifth day of July, 1885, one D. V. Mott was the duly elected, qualified, and acting county treasurer of Coffey county, Kansas; that the said C. O. Brown, as judge of the said probate court, has, during his said term of office, neglected and refused to perform certain acts hereinafter particularly set forth and stated, which it was his duty as judge of the said probate court to perform, which neglect and refusal to do said acts cause and work a forfeiture of his said office of probate judge of said Coffey county, Kansas.

"(1) He, the said C. O. Brown, as judge of the said probate court, neglected and refused, during the first quarter of this, the year 1885, to examine and count the funds in the hands of said D. V. Mott, the county treasurer as aforesaid of said Coffey county.

"(2) He, the said C. O. Brown, as judge of the said probate court, neglected and refused, during the second quarter of this, the year 1885, to examine and count the funds in the hands of the said D. V. Mott, the county treasurer as aforesaid of said Coffey county.

"(3) He, the said C. O. Brown, as judge of the said probate court, has, during all the months of January, February, March, April, May, June, and July,

in this, the year 1885, neglected and refused, and he has not at any time in any of the said months made any attempt, to examine and count the funds in the hands of the said D. V. Mott, the county treasurer as aforesaid of said Coffey county; and by reason of his said failure as aforesaid to examine and count the funds in the hands of the county treasurer as aforesaid, as is required by law, the said D. V. Mott, county treasurer of said Coffey county, made default in a large sum, to-wit, in the sum of forty-five thousand dollars.

"Wherefore said county attorney, on behalf of and in the name of the state of Kansas, prays judgment that the said C. O. Brown, by reason of his aforesaid acts, refusal to act, and misconduct, may be adjudged and declared to have forfeited his said office of probate judge of Coffey county, Kansas, and that he be ousted and removed therefrom.

"A. W. EDGERLY, County Attorney of Coffey County, Kansas.

"S. B. BRADFORD and E. A. AUSTIN, of Counsel.

"HAZEN & ISENHART, Special Counsel."

Subsequently the defendant filed the following demurrer, (omitting court and title:)

"Comes now said defendant, C. O. Brown, probate judge of Coffey county, Kansas, and demurs to the petition of the plaintiff filed herein, for the following reasons, to-wit: (1) That this court has no jurisdiction of the subject of the action attempted to be stated in the said petition; (2) that said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

C. O. BROWN.

"By G. E. MANCHESTER, his Atty.

"G. N. MCCONNELL and JOHN M. RANKIN, of Counsel."

S. B. Bradford, Atty. Gen., A. W. Edgerly, Co. Atty., E. A. Austin, and Hazen & Isenhardt, for plaintiff.

G. E. Manchester, J. M. Rankin, and G. N. McConnell, for defendant.

HORTON, C. J. This is an action in the nature of *quo warranto*, brought by the plaintiff to remove the defendant from the office of probate judge of Coffey county, in this state, because of an alleged failure to perform the duties imposed by section 3, c. 8, Sp. Sess. 1874. This section reads as follows:

"It shall be the duty of the probate judge in each county, once during each quarter of each year, without notice to said county treasurer, to examine and count the funds in the hands of the county treasurer, and the county commissioners of each county shall, prior to each examination, appoint two persons, citizens and tax-payers of the county, whose duty it shall be to assist the probate judge in making the examination aforesaid, but no person so appointed shall act as examiner more than once in the same year." Section 75c, c. 25, Comp. Laws 1879.

It has already been decided that the legislature may confer new duties—judicial, *quasi* judicial, or ministerial—upon probate courts or probate judges in this state, aside from the ordinary powers authorized by the constitution. *In re Johnson*, 12 Kan. 102; *Young v. Ledrick*, 14 Kan. 92; *State v. Majors*, 16 Kan. 440; *Intoxicating Liquor Cases*, 25 Kan. 751. Whether they could be compelled to perform the duties which the various acts of the legislature undertake to require of them outside of the jurisdiction defined by the con-

stitution has never been settled by this court. The decisions recognizing the authority of the legislature to confer upon probate courts and probate judges additional powers or duties not defined by the constitution, seem to assume that the authority thus exercised constitutes powers and duties distinct from those of a probate court or probate judge. This idea underlies the past rulings of this court. Thus, in granting injunctions for the district court, a probate judge acts in the capacity of a commissioner of that court. A probate judge, in granting a druggist's permit, acts somewhat as a commissioner of licenses or permits. *In re Johnson, supra; Intoxicating Liquor Cases, supra; State v. Laughton*, (Nev.) 8 Pac. Rep. 344. See, also, the decisions of BENSON, J., and SPILLMAN, J., upon the power to appoint a county auditor. 2 Kan. Law J. 39-57.

To require of a probate judge the performance of the duties imposed by said chapter 8, none of which pertain to the judicial office, and for the performance of which the judge must leave his court-room, and enter an office separate from his own, and there perform purely ministerial acts for several days in each year, is in the nature of attempting to put upon him the duties of another office, although in the discharge of such new duties he still may be styled a probate judge. In the performance of such duties he is not acting as a judge or as a court. Therefore we cannot say, in this proceeding, that the defendant's right to hold the office of probate judge, and enjoy the powers and emoluments thereof, depends upon a faithful discharge of the duties imposed by the statute above cited. If the defendant has failed or neglected to do something which said statute requires, he may, perhaps, be removed from such new office or position; but because he does not comply with that statute, he has not forfeited his office as probate judge, and therefore cannot be removed therefrom under the allegations of the petition. *State v. Judges, etc.*, 21 Ohio St. 1, to which we are referred, is not in accordance with the prior adjudications of this court.

The demurrer will therefore be sustained.

(All the justices concurring.)

(35 Kan. 236)

### ATCHISON, T. & S. F. R. Co. and others v. FLETCHER.

Filed April 9, 1886.

#### 1. CORPORATIONS—POWERS—CHARTER.

A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other states and countries, so long as it does not depart from the terms of the charter under which it was created.

#### 2. SAME—ADDITIONAL POWER CONFERRED BY STATUTE.

Additional powers, auxiliary to the original design or purpose of a corporation, may be conferred thereon by the legislature of the state where the corporation is created.

#### 3. RAILROADS—GUARANTYING BONDS.

Under the provisions of the charter of the Atchison, Topeka & Santa Fe Railroad Company, of February 11, 1859, and the terms of the statutes of

Kansas, if such company guaranties a bond or other negotiable instrument, and takes the same as its own and sells it, its guaranty will be binding upon the company in the hands of an innocent holder for value, and without notice of the origin of its title, even if the guaranty of that particular bond, or other negotiable instrument, when made, was *ultra vires* in that special instance.

4. SAME—LEASE OF ROAD AND APPURTENANCES.

Any railway company organized under the laws of this state may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease.

5. SAME—AUTHORITY OF ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

Under its charter, and the statutes of the state, the Atchison, Topeka & Santa Fe Railroad Company cannot only lease a Colorado railroad, but can also lease roads in New Mexico, Arizona, and old Mexico, if each road so leased thereby becomes, in the operation thereof, a continuation and extension of the road of the Atchison Company.

6. SAME—ACCEPTANCE OF STOCK OF SONORA RAILWAY COMPANY.

Upon the facts disclosed in this case, the Atchison, Topeka & Santa Fe Railroad Company, under its charter and the statutes of the state, had authority to accept the stock of the Sonora Railway Company, of Mexico, and guaranty its mortgage bonds.

7. INJUNCTION—NOTICE.

The statute expressly provides, if a court or judge deem it proper that the defendant, or any party to the suit, shall be heard before granting a temporary injunction prayed for, that reasonable notice may be given to such party, and in the mean time a restraining order may be issued. Therefore a court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice, is not in accordance with a fair and orderly administration of justice.

Error from Wyandotte county.

Geo. W. McCrary, James Hagerman, and Peck & Johnson, for plaintiff in error.

Waters & Chase and Henry M. Cheever, for defendant in error.

HORTON, C. J. The facts in this case, as they appear from the record, are substantially these: The legislative assembly of the territory of Kansas incorporated, in 1859, "The Atchison & Topeka Railroad Company." The company was authorized to survey, construct, and operate a railroad, with one or more tracks, from Atchison, on the Missouri river, to Topeka, and to such point on the southern or western boundary of the territory, in the direction of Santa Fe, New Mexico, as might be most convenient and suitable for the construction of the road; and it was also authorized to build a branch of the road to any point on the southern boundary of the territory of Kansas in the direction of the Gulf of Mexico. On November 26, 1863, the name of the company was changed to "The Atchison, Topeka & Santa Fe Railroad Company." After its organization the company proceeded to build its line of railroad, so that it was put in operation from Topeka to Newton, April 15, 1872; from Newton to Dodge City, September 15, 1872; and from Dodge City to the western boundary of the state, in the direction of Santa Fe,

New Mexico, January 1, 1873; making a distance altogether of over 470 miles. From the terminus of the railroad on the western boundary of Kansas to the boundary line between Colorado and New Mexico, the Pueblo & Arkansas Valley Railroad Company built a line of railway, and completed the same on July 10, 1879, a distance of about 170 miles. From the terminus of the Pueblo & Arkansas Valley Railroad to San Marcial, New Mexico, the New Mexico & Southern Pacific Railroad Company built a line of railway, a distance of over 353 miles, which was put in operation October 1, 1880. From San Marcial to Deming, a point on the Southern Pacific railroad, distant from San Marcial a little over 129 miles, the Rio Grande, Mexico & Pacific Railroad Company built a road, which was finished March 20, 1881. The Sonora Railway Company, Limited, is a corporation organized to build and operate a railway from the boundary line between the United States and Mexico to Guaymas, on the Gulf of California, 262 miles in length. In 1881 this company had completed only 90 miles of its railway from Guaymas, extending in a northerly direction towards the said boundary line.

It was the intention of the directors of the Atchison Company to have built an independent road from Deming to the Mexican boundary to connect with the Sonora road, but in 1881, a satisfactory proposal having been made by the Southern Pacific Railroad Company for the joint use of so much of its track as might be required, an agreement was made between the two companies, subject to termination by either party giving two years' notice to the other, by which the Atchison Company was permitted to run its trains, with the same rights as the Southern Pacific trains, over the Southern Pacific road from Deming to Benson, a distance of 174 miles. From Benson the Atchison Company built a road called the New Mexico & Arizona Railroad, to connect with the Sonora road at or near Los Nogales, on the Mexican border, about 97 miles long. The Sonora Railway, extending from Guaymas to Nogales, was completed on November 25, 1882. In 1881 the directors of the Atchison Company entered into a contract with the Sonora Company, by which the capital stock of the Sonora Company, amounting to \$5,248,000, was transferred to the Atchison Company in consideration of the issuance and delivery of \$2,700,000 of the capital stock of the Atchison Company to the Sonora Company, and the guaranty by the Atchison Company of the interest, at 7 per cent. per annum, of \$5,240,000 of the first mortgage bonds of the Sonora Company. Four million and fifty thousand of the bonds so guarantied have been marketed, and \$1,190,000 of the bonds are in the treasury of the Atchison Company. Ever since the purchase of the Sonora stock, and the guaranty of the interest on its bonds by the Atchison Company, the Sonora road has been operated by the Atchison Company, and its expenses have been borne by that company. The annual interest on the bonds of the Sonora Company so guarantied by the Atchison Company amounts

to the sum of \$283,500 a year, and is payable in July and January of each year.

On December 16, 1885, John W. Fletcher, of the city of Detroit, Michigan, claiming to be the owner of 200 shares of the capital stock of the Atchison Company, of the value of \$17,000, commenced this action in the district court of Wyandotte county, in this state, for the purpose, among other things, of canceling the contract between the Atchison Company and the Sonora Company, by which the Atchison Company agreed to guaranty the interest on its bonds; to discharge the Atchison Company from all liability in respect to the guaranty; and to enjoin the directors and agents of the Atchison Company from any further payment of interest on the bonds. The petition was presented to the district judge in vacation, who, without notice to defendants, or either of them, granted a preliminary injunction, as prayed for, against the Atchison Company, its directors, officers, and agents, from paying any interest on the bonds of the Sonora Company. The amount of the undertaking fixed by the district judge upon allowing the injunction was \$1,000 only. The Atchison Company subsequently appeared before the judge and excepted to his ruling, and at once brought the case to this court upon petition in error for the purpose of raising the question whether the injunction was properly granted.

The most important inquiry is whether the petition, taking all of its allegations to be true, shows that the contract of guaranty complained of was *ultra vires*. Upon the part of plaintiff below it is contended that this contract was entirely unauthorized by the charter of the Atchison Company, and beyond the power of the directors of that company to consent to or to execute, and therefore wholly void and of no binding force upon the corporation or its stockholders. On the part of defendants, the claim is that under the powers conferred upon the Atchison Company by its charter, the subsequent legislation of this state, and the general principles of law applicable to corporations, the contract was and is valid in every respect.

The petition alleges that during the years 1882, 1883, 1884, and 1885 the operating expenses have been greater than the earnings, and but for the guaranty of the Atchison Company, that the Sonora bonds would be worthless. The petition further alleges that if the Atchison Company continues to operate the Sonora road, and keeps the guaranty of its bonds good, it will be at the cost of the depletion of its treasury, and will render the dividends upon its stock less in amount than they otherwise would be. The question before us, however, is one of power. If the Atchison Company had the authority to accept the stock of the Sonora Company, and guaranty its mortgage bonds, it is liable on the guaranty, whether the Sonora road be a sucker, sapping the very life of the Atchison Company as a consumer of its earnings, or a feeder, filling to overflowing a plethoric treasury. Common honesty will forbid a corporation, as it will a

private individual, from evading the terms of a contract upon the ground merely that it has been unexpectedly expensive, and therefore not remunerative. In this connection, perhaps, it should be said that the directors of the Atchison Company still insist that the contract with the Sonora Company will prove very desirable and profitable in the end. They go further, and say that the Atchison Company and its stockholders have already received benefits from the contract by the acquisition of connecting roads, and the extension of their line, so as to make a through route, which was absolutely necessary to the financial success of their company; and that thereby the earnings and profits of the line, as a whole, have been largely augmented. As to the wisdom or expediency of the execution of the contract between the Atchison and Sonora Companies, as an original proposition, we have nothing to do. Whether the contract between these companies be a productive or an unfortunate one for the Atchison Company is immaterial to our determination of this case. The question with us is whether the contract was within the scope of the powers of the Atchison Company to execute or perform, under any circumstances or for any purpose, not whether the Atchison Company made a good or bad bargain.

Notwithstanding the terms of the charter of the Atchison Company, the various provisions of the statute, and the unwritten law of comity that a corporation will be recognized and permitted to prosecute its lawful enterprises in every state which has not expressly refused its consent, the senior counsel representing the plaintiff insists that the Atchison Company has no legal right, by purchase, lease, or other arrangement, to operate its road, or run its cars as a part of its own system, beyond the territorial limits of Kansas. The proposition of another counsel representing the plaintiff is that while the Atchison Company is not confined exclusively to the limits of the state, yet that the road beyond the New Mexico line is operated without legal authority. Very able arguments were presented by the several counsel upon the hearing of the case, and very elaborate briefs have been filed with us. We have given all of these careful attention and examination, and have reached the conclusion, after much deliberation of the serious matters involved, that the proposition asserted by counsel of plaintiff limiting the power of the Atchison Company in its operations wholly to the state of Kansas, or to adjoining states, is unsound, and receives no support in the sections of the statute cited, or in the authorities controlling. The petition assumes that the acquirement by the Atchison Company of the intermediate links between the Kansas line and the Sonora line was unauthorized; but the allegations are indefinite as to the actual relations existing between these intermediate links and the Atchison Company. We think, however, it is sufficiently shown that the Atchison Company is operating its line of road from Atchison and Kansas City to connect with the Sonora road at Nogales, on the Mexican border. It

is a general rule that the allegations of a pleader shall be taken most strongly against himself, and therefore we are not to assume that the directors of the Atchison Company, in their arrangements for operating their line from Kansas to Mexico, are acting contrary to the purposes for which the corporation was created. The presumptions are, in the absence of allegations of facts to the contrary, that the Atchison Company is acting under, and in accordance with, the provisions of its charter, and the statutes conferring authority upon it. *Railroad Co. v. Davis*, 34 Kan. —; S. C. 8 Pac. Rep. 146, 530.

It is a general rule that the corporations of one state will be permitted to carry on their business, and extend their operations, in other states and countries, so long as they do not depart from the terms of the charters under which they were originally created. Under the comity of states, or, rather, we should say, under the comity of nations, the Atchison Company can exercise all the powers granted by its charter in Sonora, or in the other states of Mexico, as well as it can in Missouri, Colorado, or New Mexico, if its powers thus exercised are not repugnant to or prejudicial to the interests or laws of Mexico; therefore, that the Sonora road is in a foreign country does not, we think, affect the case. In fact, a corporation is clothed everywhere with the character given by its charter, and the capacity of corporations to make contracts beyond the states of their creation, and the exercise of that capacity, are supported by uniform, universal, and long-continued practice. *Land Grant Ry. Co. v. Board of Co. Com'rs of Coffey Co.*, 6 Kan. 245; *O'Brien v. Wetherell*, 14 Kan. 616; *Bank of Augusta v. Earle*, 13 Pet. 519; *Cowell v. Spring Co.*, 100 U. S. 55.

Hundreds of corporations are created not strictly local in their character, as in the instance of banks and insurance companies, all of which transact business in all sections of the country. To illustrate the frequency with which corporations exercise great powers in foreign countries, counsel for defendants, upon the argument, cited the East India Company, chartered in England, but doing business throughout the East Indies; the Pacific Mail Steam-ship Company, a New York corporation, operating a line of steamers from New York City via Panama to San Francisco; the Western Union Telegraph Company, a New York corporation, having its offices in almost every city of the Union; the Maxwell Land Company, a Netherlands corporation, owning vast estates in New Mexico; and it was asserted by the same counsel that the Sonora Company, alleged in the petition to be a Mexican corporation, is in fact a corporation created under the laws of Massachusetts. We may also refer, among many others that might be named, to the following corporations: The Colt's Patent Fire-arms Manufacturing Company, although an American corporation, trades extensively in England; the Liverpool, London & Globe Insurance Company, the Royal Insurance Company, the Sun Fire Insurance Company, Limited, the Phoenix Assurance Company, of London, are all English corporations, but they transact business in many

states of the Union; the North British & American Insurance Company, the Norwich Union Fire Insurance Society, and the Queen Insurance Company, and other English corporations, write risks in Kansas; the Western Assurance Company is a Canadian corporation, accepting fire risks in this state; the Panama Railroad Company was incorporated in New York, and built a road across the Isthmus of Panama; the Wells-Fargo Express Company, one of the greatest of the common carriers, is a Colorado corporation. It is a matter of general knowledge that many cattle companies recently chartered in England, now transact business, involving millions of dollars, in the western territories.

It is well settled that a railway corporation may contract to carry beyond the terminus of its own line, and such a contract will be valid, although requiring transportation in another state or country. *Railway Co. v. Beeson*, 30 Kan. 298; S. C. 2 Pac. Rep. 496; Hutch. Carr. §§ 144, 152. The Narragansett Steam-ship Company was, and perhaps is now, a common carrier between New York and Fall River. It receipted for a trunk to be delivered at Boston. The trunk failed to reach its destination, and, in an action against the company by the owner for its value, it was decided that the company was bound to carry the trunk to Boston the same as if its vessels went to that city, and was therefore liable for the loss. *Berg v. Company*, 5 Daly, 394. And the weight of authority is that a railway company deriving its powers to engage in business from its charter, which, by the very terms thereof, is limited to the road between certain designated points, can bind itself as a common carrier beyond its designated line. *Perkins v. Railroad Co.*, 47 Me. 573; *Bissell v. Railroad*, 22 N. Y. 258; Hutch. Carr. § 153, and cases cited. If railway corporations may contract for the transportation of freight and passengers in other states, and beyond their chartered *termini*, why may not such a company convey, in its own cars and trains, freight and passengers over connecting and continuous lines in other states, if it can make arrangements with such connecting and continuous lines so to do?

It is the necessary deduction from the principles announced in the foregoing decisions that if the Atchison Company is empowered by its charter and the statutes of Kansas to lease, or by any other arrangement to run, its cars outside of the state, it can exercise that power everywhere, and as well in Mexico as in Colorado or Arizona. This brings us to the construction of the charter of the Atchison Company, and the legislature of the state conferring rights and powers upon railroad corporations. In interpreting the powers possessed by a corporation, we must look to the intention of the legislature in the enactment of the statute. It is manifest the legislative assembly of the territory of Kansas, in granting the charter to the Atchison Company, anticipated that some day the road would become a part of a transcontinental line, and thereby that Kansas, by

reason of its geographical location, would have passing over it the great traffic of the country,—east and west, north and south,—because it provided for building its road in the direction of Santa Fe, and also of the Gulf of Mexico.

Section 1 of said charter reads:

"That C. K. Holliday, Luther C. Challiss, Peter T. Abell, \* \* \* with such other persons as may associate with them for that purpose, are hereby incorporated a body politic and corporate, by the name of the Atchison & Topeka Railroad Company; and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places; may make and use a common seal, and alter or renew the same; be capable of contracting and being contracted with; and are hereby invested with all powers and privileges, immunities and franchises, and of acquiring by purchase or otherwise, and of holding and conveying, real and personal estate which may be needful to carry into effect fully the purposes and objects of this act."

Section 20 of said charter gives express authority "to make such contracts and arrangements with other railroads which connect with or intersect the same as might be mutually agreed upon by the parties, for leasing or running their roads, or any part thereof, in connection with roads in other states, and to consolidate their property and stock with each other; \* \* \* and to have all the powers, privileges, and liabilities that they may hold by their several charters." Then the additional authority was granted by the first and second sections of chapter 92, Sess. Laws 1870, whereby the Atchison Company could consolidate with a connecting road, and a company of this or an adjoining state could lease the road of the Atchison Company. The limitations in these sections providing for consolidation and extension were that the lines of the road consolidated should, when completed, form a continuous line of railroad, and when a company leased its road to another railroad company, the line of the road should so connect with the leased road as to form a continuous line. We think a fair construction of section 3 of that act to be that any railroad company may lease its road and appurtenances to any Kansas company when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease. The section is as follows:

"That any railroad company shall have power to lease its road and appurtenances to any railway corporation organized under the laws of this state, *or of any adjoining state*, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease."

The only difficulty in the construction of this section arises from the words "or of any adjoining state;" but it may be that these words refer to a corporation of an adjoining state that has come into the state and leased a Kansas road under the terms and conditions of the statute. If, however, the legislature was inadvertently legislating in said section 3 for a railroad company of another state to lease

a road not touching Kansas, we do not think this would vary the construction we have given to the other portions of the section. In the second section the law allows the road of an adjoining state to come in and lease a Kansas road, and a Kansas company to lease the road of another Kansas company, and then the broad authority is given in section 3 for any railway company, organized under the laws of this state, to lease the road and appurtenances of any other railway corporation, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease. If section 3 was intended merely to give a Kansas railroad company the power to lease another Kansas railroad, it is but a repetition of said section 2, and the whole of said section is meaningless and useless; but if the section be given the interpretation as stated, it has full force and operation, and permits any Kansas railroad company to lease any other railway, whether in or out of the state, when the road so leased shall thereby become, in the operation thereof, a continuation of the Kansas company.

In 1873 the legislature passed a further act, which reads:

"That it shall be lawful for any railroad company created by or existing under the laws of this state, from time to time, to purchase and hold stock and bonds, or either, or to guaranty the payment of the principal and interest, or either, of the bonds of any other railroad company or companies, the line of whose railroad, constructed or being constructed, connects with its own."

Under the construction we have given to its charter and the statute, the Atchison Company had the right to lease the road and appurtenances of any railway company in Colorado, New Mexico, or Arizona, or elsewhere, when the road so leased, in the operation thereof, formed a continuation or extension of the Atchison road. Under this power, we think the Atchison Company not only could lease a Colorado road, which is conceded by one of the counsel of plaintiff, but could go on and lease all the intermediate links between Kansas and Mexico, and when it came to the border of Mexico it could also lease the Sonora road. Each road so leased would form, within the terms of the statute, in the operation thereof, a continuation and extension of the Atchison road. Having all this power, then clearly, under its charter and the Laws of 1870 and 1873, the Atchison Company had full authority to purchase and hold the stock and bonds of the Sonora Company, and to guaranty the payment of the interest of the bonds of that company, because the line of that road, as constructed, connects with its own.

There is no force in the proposition that there is a missing link between Deming and Benson, a distance of about 174 miles, and therefore that the Atchison road does not continue and extend via the New Mexico & Arizona Railroad to the Sonora Railway at Nogales. It is true the Southern Pacific built this link, and may be said to be its owner, but the Atchison Company has a general use thereof with

the Southern Pacific, and has the same rights therein as that company. It virtually has a lease thereon, because it is in the possession of and operating it with such rights of ownership, or as lessee, as is necessary for all running or operating purposes. *Van Hostrup v. Madison*, 1 Wall. 291; *Schuyler Co. v. Thomas*, 98 U. S. 169; *Mayor v. Railroad Co.*, 21 Md. 50.

Something has been said about the contract between the Atchison and Sonora Companies being void, because the Atchison Company was not actually connected at Nogales at the time of the execution of the guaranty. Even if there was anything in the proposition, in view of the terms of the statute of 1873, providing for the guaranty by one railroad company of the bonds of another company, whose road was being constructed so as to connect with its own, we are clearly of the opinion that as to the bonds marketed, and in the hands of *bona fide* holders, the contract between the companies is binding. "Where the statute confers express authority upon the company to guaranty the bonds of another company, a mere failure on the part of the guarantying company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the *bona fide* holder." Wood, Ry. § 188; *Arnot v. Railway Co.*, 67 N. Y. 315; *Parish v. Wheeler*, 22 N. Y. 494; *Thomas v. Railroad Co.*, 101 U. S. 86; Field, Corp. §§ 263-267; *Bradley v. Ballard*, 55 Ill. 413; Field, *Ultra Vires*, 185; *Town of Coloma v. Eaves*, 92 U. S. 484; *Peoria, etc., R. Co. v. Thompson*, 7 Amer. and Eng. R. R. Cas. 101, 118; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *City of Lexington v. Butler*, 14 Wall. 282; *Supervisors v. Schenck*, 5 Wall. 772; *Bank v. Globe Works*, 101 Mass. 57.

The Sonora road was completed to Nogales in 1882, and the Atchison Company, having been in connection with and operating that road ever since, and having repeatedly paid interest on the Sonora bonds, has clearly ratified the contract of 1881, and therefore the guaranty of the Sonora bonds is not only valid in the hands of *bona fide* holders, but such contract or guaranty is valid for all the purposes for which it was executed.

Counsel for plaintiff object to any and to all powers granted the Atchison Company subsequent to the creation of its charter in 1859, and in support thereof say that the relation between the corporation and stockholders is one of contract; that the stockholder subjects his interest to the control of the proper authorities to accomplish the object of the organization, but does not agree that the purpose shall be changed in its character at the will of the directors or a majority of the stockholders; and that the contract between the corporation and the stockholders cannot be changed without the consent of the contracting parties, by the legislature, or any other authority. We concede that where the power is not reserved in the legislature to repeal or amend a charter, that, so far as the charter states a compact between the corporation, it cannot be changed or repealed by the legis-

lature, but it is settled that the legislature may authorize a body of incorporators to exercise new powers or franchises without impairing those previously granted, and if the new powers can be exercised without a departure from the original compact between the incorporators, there is no reason why they should not be accepted and exercised on behalf of the company by a majority of the stockholders.

The special point was made in the case of *Union Pac. R. Co. v. Atchison Co.*, 26 Kan. 669, that as the charter of the latter company made certain provisions for exercising the right of eminent domain, the company could not proceed to exercise that right under the general railroad law. It was held that it could, and that the general law applied to all corporations. We said in that case, "if a company had no right of eminent domain given by its special charter, the state legislature could, by general law, endow it with such right; and if it had the right, the legislature could, by a similar law, enlarge its modes of proceedings." All the legislation of the state that we have referred to is in harmony with the terms and provisions of the charter of the Atchison Company; therefore no franchises are diminished, no contract impaired. At most, its powers are enlarged to carry out successfully the object of its incorporation. So to speak, auxiliary powers are added, but its charter not violated, or the benefits thereby granted infringed. *Clearwater v. Meredith*, 1 Wall. 25; *Sprigg v. Company*, 46 Md. 67; *Green's Brice's Ultra Vires*, 80, 84; *Fry v. Company*, 2 Metc. (Ky.) 314.

For many purposes, the Atchison Company can receive, in the transaction of its legitimate business in this state, bonds and other negotiable paper; and having received such negotiable instruments, it may sell and dispose of the same; and in selling and disposing of the same, it may guaranty that they are genuine, and it may also guaranty the payment thereof. Therefore, if the Atchison Company had no authority under its charter and the statutes to run its cars through Colorado, New Mexico, Arizona, and Sonora to the Gulf of California, and was wholly confined to the transaction of its business within the territorial limits of the state, we think, within the power conferred by its charter, its guaranty of the Sonora bonds would be binding upon the company in the hands of parties purchasing them with such guaranty, in good faith, and without notice. *Pendleton v. Amy*, 13 Wall. 297; *Railroad Co. v. Howard*, 7 Wall. 392; *Arnot v. Erie Railway Co.*, *supra*; *Bigelow, Estop.* 467; 16 Amer. & Eng. R. R. Cas. 488.

As to the equities in this case, nothing is disclosed beneficial to the plaintiff. If he was a stockholder of the Atchison Company in 1881, at the time of the execution of the contract of guaranty with the Sonora Company, he appears before the court as a participant, watching the venture, and, if successful, willing to enjoy the fruits thereof; but as the experiment, in his opinion, has failed, he turns to the court for assistance to repudiate its terms. If he is a recent purchaser of

the stock, he ought to have known from the records of the company the terms and conditions of its contracts, and hence was a purchaser with full knowledge of the guaranty of the Sonora bonds. Under such circumstances, he may be said to have purchased for the purpose of becoming a litigant, not merely to prevent a contemplated transaction, as in the case of *Du Pont v. Northern Pac. R. Co.*, 18 Fed. Rep. 467, but to annul a contract guarantying bonds, already executed,—at least so far as the innocent purchasers thereof are concerned. Millions of the bonds have gone upon the market, and have passed in the hands of *bona fide* holders for value. Very cogent reasons should appear before a court of equity should interfere. They do not so appear. High, Inj. § 1206; *Thompson v. Lambert*, 44 Iowa, 239; *Gregory v. Patchett*, 33 Beav. 595; *Watts' Appeal*, 78 Pa. St. 370; *Chapman v. Railroad Co.*, 6 Ohio St. 120; *Terry v. Lock Co.*, 47 Conn. 141; *Samuel v. Holladay*, 1 Woolw. 400; *Goodin v. Canal Co.*, 18 Ohio St. 169.

It was said upon the argument by counsel for plaintiff that it is gross injustice to its stockholders for the Atchison Company to plant its money or property in a foreign country. To this it may be answered: The stockholders control the company. The directors are elected or chosen by the stockholders, and it goes without saying that the stockholders, as well as the directors, should have at heart the highest interests of the company. Of course, the directors must have some power to determine what is for the best interest of the company, and some discretion must always be left for them to exercise. Matters of policy and expediency, within the terms imposed by the charter and the statutes of the state, are for their consideration and determination, subject to the will of the stockholders, to whom they are responsible, and by whom they are elected. "Railroads, as all know, are things of growth. They enlarge with the development of the country," (*Railroad Co. v. Atchison Co.*, *supra*;) and railroading is a business wherein progress is absolutely necessary. A railroad cannot stand still. It must either get or give up business. It must make new combinations, open new territory, and secure new traffic, or lose its business and reduce its revenues. The directors must consider all of these things in their management of the affairs of such a corporation. In concluding this part of the subject, we may say, further, that the petition nowhere charges the directors of the Atchison Company with incapacity, collusion, corruption, or fraud. It attacks the integrity of the system of the Atchison Company beyond the limits of the state, but not the integrity of its officials.

This disposes of the case. A few words, however, concerning the action of the district judge in granting the temporary injunction. It is unnecessary to decide whether he was guilty of an abuse of judicial discretion sufficient of itself to cause a reversal of this case, but the practice of granting injunctions without notice to defendants, except in case of extreme emergency, deserves condemnation; and

the granting of an injunction in such an important case as this, without notice, when it is within the general knowledge of every attorney and judge that the Atchison Company has an officer or agent in every county of the state through which its road runs upon whom legal process may be served, is very censurable. The semi-annual interest upon over four millions of bonds was intended to be tied up by the order of the district judge, which bonds, according to the petition itself, have been marketed, and the holders are very numerous. In addition to this, the order would naturally depreciate the value of the bonds in the markets of the world, and thus innocent purchasers thereof become the immediate and the greatest sufferers. The statute provides if a court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to the party to attend for such purpose at a specific time and place, and may, in the mean time, restrain the party. If there was ever a case where defendants should have been notified and heard before the granting of a temporary injunction, this is one. Under the statute, instead of issuing a temporary injunction in the first instance, the judge, if proper facts had been presented to him, might have issued a restraining order, and directed notice to be given. The granting of a temporary injunction, under the circumstances, was not in accordance with a fair and orderly administration of justice.

The order granting the temporary injunction will be reversed, the injunction will be wholly dissolved, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

## SUPREME COURT OF UTAH.

(4 Utah, 385)

YEARIAN v. SPEIRS, Justice of the Peace.

Filed April 24, 1886.

## 1. TERRITORIAL LEGISLATIVE POWERS — JUDICIAL TRIBUNALS—JURISDICTION AS SUBJECT OF LEGISLATION.

Jurisdiction is a rightful subject of legislation by the territorial legislature of Utah, provided that such legislation is consistent with the constitution of the United States and the laws of congress.

## 2. SAME—JUSTICES OF PEACE — LIMITATION UPON JURISDICTION CONFERRED BY LEGISLATURE.

The jurisdiction of justices of the peace, as vested in them by the territorial legislature, in the exercise of its legitimate powers, must be "as limited by law."

## 3. SAME—EXTENT OF JURISDICTION—TRIAL AND PUNISHMENT FOR MISDEMEANORS.

Congress never intended to allow such legislation by the territorial legislature as should empower a justice of the peace to punish for misdemeanors to the extent of imprisonment for six months, and by fine "in any sum less than \$300."

## 4. JUSTICE OF THE PEACE — JUSTICE EXCEEDING JURISDICTION — LACK OF JURY TRIAL—LACK OF RELIEF BY APPEAL.

Where a justice of the peace acts wholly beyond his jurisdiction, and there is no provision for a trial by jury in his court, or in the appellate court, the objection that there is no jury trial in the justice's court is not satisfied by appeal.

## 5. SAME—WRIT OF PROHIBITION—RIGHT OF PETITIONER.

Where, in the case of the petitioner, a justice of the peace has acted, and is proceeding to further act wholly without his jurisdiction, and the petitioner appears to have no plain, speedy, and adequate remedy in the ordinary course of law, the petitioner has a right to his writ of prohibition.

## 6. SAME—POWER OF SUPREME COURT IN REFERENCE TO THE WRIT.

It is within the power of the supreme court of Utah to issue the writ of prohibition, either as an original writ, independent of the appellate powers of the court, or as a writ in aid of such appellate powers.

ZANE, C. J., dissents.

On application for a writ of prohibition.

*Sutherland & McBride*, for petitioner.

*Le Grande Young*, for respondent.

BOREMAN, J. This is an application for a writ of prohibition. The petitioner was arrested on warrant issued by the defendant, a justice of the peace, upon a complaint charging him with having resorted to a house of ill fame for lewdness. Upon being taken before the justice the petitioner applied to have the matter submitted to the grand jury, which was then in session, but the justice decided that he had jurisdiction of the case, and required the petitioner to enter into bond in the penalty of \$1,000 for his appearance to answer the charge in the justice's court, and a time for the trial was fixed. Prior to the time set for the trial the petitioner, upon his affidavit, made application for a writ of prohibition to restrain and prohibit the justice from further proceeding in the case, on the ground of

want of jurisdiction, and excess of jurisdiction, in the justice of the peace to hear, try, and determine the matter. An alternative writ was issued, returnable into this court. The defendant filed his demurrer and answer to the petition. The demurrer and the case made by the petition and answer were argued together by the counsel for the respective parties, and we shall consider them together.

The demurrer was based upon the grounds that this court had no original jurisdiction of the subject of the action, and that the writ or petition did not state facts sufficient to constitute a cause of action. This court can have no power to issue the writ of prohibition, unless it be conferred by the organic act, or some other act of congress, or by some territorial statute within the power of the legislature to pass. The organic act of the territory (9 St. at Large, 453, § 9) provides that "the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction," and the supreme court of the United States says that this language "includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice." *Ferris v. Higley*, 20 Wall. 375.

We do not understand it to be denied that this court would have jurisdiction to issue the writ in aid of its appellate powers. The denial seems to go only to its power to issue the writ as an independent, original writ. This court, possessing appellate powers, has, as a part thereof, a superintending control over the inferior tribunals of justice throughout the territory, and has likewise a right to protect and enforce its appellate powers. The supreme court of the United States, although authority to issue writs of this class otherwise than as part of its appellate jurisdiction is denied to it by the constitution, which forbids its exercising any other than appellate powers generally, yet it is held to be empowered to use these writs in aid of its appellate powers. In *Marbury v. Madison*, a *mandamus* case, that court recognized that *mandamus* could be used as part of its appellate powers, and it declared that "it is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause." 1 Cranch, 175.

The same court again, upon certain applications for writs of *habeas corpus*, through Chief Justice MARSHALL, in the opinion of the court, seemed to place *habeas corpus* and *mandamus* in the same class, and referred to the case of *Marbury v. Madison*, and held that in the matter then before the court the appellate powers alone of the court were sought to be exercised; that in granting the writs of *habeas corpus* it was the purpose to revise the decision of an inferior court by which a citizen had been committed to jail; and that such revision was simply the exercise of appellate jurisdiction. *Ex parte Bollman*, 4 Cranch, 75-101.

In the case at bar it is likewise sought to revise and correct the proceeding in a cause already instituted, and not one created by this court, and to prevent further action where the court below is claimed

to be acting without authority of law, and which, without authority, may commit a citizen to prison. The writ of prohibition is oftentimes resorted to in aid of the appellate power of the court, for the purpose of preventing unauthorized action by an inferior court, and to control the action of the lower court. 1 Abb. Pr. (N. S.) 341; 2 Abb. Pr. (N. S.) 214. We are therefore inclined to think that it is only necessary to invoke the appellate powers of this court in order to obtain sufficient authority for issuing the writ in the case at bar.

It seems clear, then, that authority in this court to issue these writs—at least in aid of the appellate jurisdiction of the court—is conferred under and by the general language of the organic act granting chancery and common-law jurisdiction, and authorizing appeals to this court. But the more consideration we give to this general language, “chancery and common-law jurisdiction,” the more strongly are we inclined to hold that, under it, this court has full power to issue these writs, not only in aid of the appellate jurisdiction of the court, but also as an independent, original proceeding, aside from appellate powers. From the reasoning of the supreme court of the United States we are inclined to think that that court would have so held in regard to its own powers had it not been for the prohibiting clause of the constitution. Const. art. 3, § 2, cl. 2. There is no such prohibition upon the original jurisdiction of this court. It is evident that if the language of the original act was to cover those writs at all, they were to cover the writs as known at the common law.

At common law the writ of prohibition, and the other writs, were used, not only in aid of appellate jurisdiction, but also as original, independent writs, aside from appellate power of the court issuing the same. The question as to the power of this court to issue the writ of prohibition has never heretofore been presented to this court, but the authority to issue writs of *certiorari* and *mandamus*, which belong to the same general class of special proceedings as prohibition, has been passed upon.

In the case of *Shepperd v. Second District Court* it was held that this court could issue the writ of *mandamus* in aid of its appellate jurisdiction, and not otherwise. 1 Utah, 340.

In the case of *Young v. Cannon* it was held that this court had jurisdiction to issue the writ of *certiorari*, under the territorial statute. 2 Utah, 560; Civil Proc. Act, § 434, (Comp. Laws, 521,) similar to section 951 of present Code of Civil Procedure, (Laws 1884, p. 322.)

In the case of *Maxwell v. Burton*, 2 Utah, 595, it was held that this court had jurisdiction to issue the writ of *mandamus* under territorial statutes, and that such provision was not in conflict with the Poland act, giving exclusive jurisdiction to the district courts in certain matters, and that the case of *Shepperd v. Second District Court*, in so far as it held a contrary doctrine, was disapproved. Civil Proc. Act, § 445, (Comp. Laws, 523;) Poland Act, Supp. 1 Rev. St. U. S. c. 469, p. 105.

The conclusion to be drawn from these decisions is that whether this court has, under the organic act, and subsequent acts of congress, original jurisdiction or not to issue the writs of this class, is not material, as the legislature of the territory has authority to give such jurisdiction, and has done so. If the legislature has such authority, and has exercised it, and has in clear and plain terms conferred upon this court such original jurisdiction, then this court has such authority in any phase of the case in which it may be viewed. The organic act (section 6) provides "that the legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." The question of jurisdiction, so long as the action thereon is consistent with the constitution of the United States and the laws of congress, is held to be a rightful subject of legislation. *Ferris v. Higley*, 20 Wall. 375.

Our attention has not been called to any provision of the constitution, or of the organic act, or any other act of congress, with which such legislation would be inconsistent, nor do we know of any such provision, or believe that any exists. There being, then, no known inconsistency, the conclusion is inevitable that the legislature has the power to confer the jurisdiction on this court to issue the writ as an original independent writ aside from any appellate jurisdiction possessed by the court. The Code of Civil Procedure declares that the writ may be issued "by any court except probate and justices' courts," (Laws 1884, p. 326, § 983;) and it further provides (Id. 158) as to the supreme court as follows:

"Sec. 19. The jurisdiction of this court is of two kinds: *First*, original; *second*, appellate.

"Sec. 20. Its original jurisdiction extends to the issuance of writs of mandate, *certiorari*, prohibition, *habeas corpus*, and all writs necessary to the complete exercise of its appellate jurisdiction."

When the decisions of this court already referred to were made, these two sections had not been enacted. The authority to this court to issue the writ of prohibition as an original writ could not well have been couched in broader terms. The jurisdiction is as complete as the legislature could make it. The court is therefore of the opinion that it is, beyond doubt, within the power of this court to issue the writ, either as an original writ, independent of the appellate powers of the court, or as a writ in aid of such appellate powers.

The authority of the court to issue the writ being established, we are next to consider whether a proper case has been made for the issuance of the writ. At common law the writ was issued "upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court;" and it could be issued where there was a total want of jurisdiction in the inferior court to hear, try, and determine the case, or when there was an excess of jurisdiction in pro-

ceeding in the case. 3 Bl. Comm. 112; 8 Bac. Abr. 206. The office of the writ is to prevent an unlawful assumption of jurisdiction, and the writ lies when the inferior court acts in excess of, or is taking cognizance of matters not arising within, its jurisdiction. *Ex parte Gordon*, 104 U. S. 515. Our territorial statute says that the writ "arrests the proceedings of any tribunal," etc., "when such proceedings are without or in excess of the jurisdiction of such tribunal," etc., and that it may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Laws 1884, p. 326, §§ 982, 983. It is well settled that the writ can never issue for error or irregularity in the exercise of jurisdiction; there must be a total want or an excess of jurisdiction.

In the case under consideration were the proceedings of the justice "without or in excess of the jurisdiction" of such justice? The provision of the territorial statute under which the complaint against the petitioner was filed before the justice reads as follows:

"Every person who keeps a house of ill fame in this territory, resorted to for the purpose of prostitution or lewdness, or who willfully resides in such house, or resorts thereto for lewdness, is guilty of a misdemeanor." Comp. Laws, p. 603, § (1996.)

The penalty for such offense is prescribed in section 1847 of the Compiled Laws, as amended so as to read:

"Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than \$300, or by both." Laws 1878, p. 5.

As there is no different punishment anywhere in the statute prescribed for the offense charged in the complaint against the petitioner, of resorting to a house of ill fame for lewdness, the punishment specified in the last section of the statute above quoted applies to it. The territorial statute further provides, in bracket section [2301] of the Compiled Laws, as amended in the Laws of 1878, p. 6, as follows:

"[2301.] Magistrates have jurisdiction to hear, try, and determine all public offenses arising in their respective counties, wherein the punishment prescribed by law does not exceed six months' imprisonment in a county jail, or a fine in any sum less than \$300, or by both."

The term "magistrates," as used in the statutes, includes "justices of the peace." Laws 1878, p. 71, § 56. In regard to justices' courts, the statute further provides that they shall have jurisdiction of "breaches of the peace, committing a willful injury to property, and all misdemeanors punishable by a fine less than \$300, or imprisonment in the county jail or city prison not exceeding six months, or by both such fine and imprisonment." Laws 1884, p. 162, § 48. The territorial statute in regard to "criminal cases in justices' courts" provides that a fine may be paid in proportion of one day's imprisonment for every dollar of fine and costs. Laws 1884, p. 145, § 48.

If, therefore, the justice sentence a party to imprisonment for six months, and to pay a fine of \$299.99, and costs, as is done sometimes, and the party be unable to pay the fine and costs, his imprisonment would be extended to about 18 months. This certainly is an extraordinary power to confer, in a mere summary proceeding, upon a justice of the peace, and it ought not to be upheld unless expressly conferred by some competent authority. This competent authority in a territory must be a law of congress, or else territorial statute enacted within the limits prescribed by act of congress. The Poland act (section 3) confers upon justices of the peace, in civil matters, jurisdiction to the extent of any sum less than \$300, but it does not, nor does any act of congress, speak of the jurisdiction of justices of the peace in criminal matters. It would seem, therefore, that we would not be authorized in assuming that congress, in conferring this extended jurisdiction in civil matters, contemplated that justices of the peace could, without a like express authority of congress, be invested by the territorial legislature with criminal jurisdiction to a much greater extent than congress had given them in civil matters. It does not seem reasonable that congress should confer the civil jurisdiction, and prescribe its limits, and, by leaving the criminal jurisdiction unprovided for, authorize and license the giving by the local legislature of a more extended jurisdiction in criminal matters.

The only authority given by law of congress to the legislature to confer any jurisdiction whatever in criminal matters is to be found in the name or title of the office. The judicial power of the territory is vested in a supreme court, district courts, probate courts, and justices of the peace. General common-law and chancery jurisdiction is given to the supreme and district courts alone, yet justices of the peace and probate courts are depositaries of part of the judicial power of the territory, and the question now is, what part?

Jurisdiction is, as we have seen, a rightful subject of legislation by the territorial legislature, provided that such legislation must be consistent with the constitution of the United States and the laws of congress. Within these boundaries the extent of the judicial power of the territory that is vested in justices of the peace as well as probate courts must "be as limited by law."

The petitioner maintains that the above-mentioned sections of the territorial statute, purporting to confer upon justices of the peace the power to punish for misdemeanors to the extent of imprisonment for six months, and by fine in any sum less than \$300, are in violation of the organic act and Poland act, and therefore void as being beyond the power of the legislature to confer; that the legislature could invest said officers with no power not embraced in the name or title of the office.

In the organic act the jurisdiction of probate courts was likewise not otherwise designated or defined than by the name or title of the courts, but it was declared that in them was vested a part of the ju-

dicial power of the territory; and the supreme court of the United States, in speaking upon the question as to what jurisdiction can be conferred by the territorial legislature upon the probate courts, said: "The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law, and in the jurisprudence of this country." *Ferris v. Higley*, 20 Wall. 375. Similar views were held by the supreme courts of some of the territories prior to its announcement by the supreme court of the United States. *Cast v. Cast*, 1 Utah, 127; *Golding v. Jennings*, Id. 135; *People v. Du Rell*, 1 Idaho, 44, 142; *Locknane v. Martin*, McCahon, 60; *Dewey v. Dyer*, Id. 77; *Otis v. Jenkins*, Id. 87.

If, in order to ascertain what jurisdiction can be exercised by probate courts, we must thus look to the general nature and jurisdiction of such courts, for the reason that there was no specifications of their jurisdiction in the organic act further than a simple naming of the courts, we are, as a logical result, in order to ascertain the jurisdiction that can be exercised by justices of the peace in criminal matters, in a like manner to look to the general nature and jurisdiction of such officers "as they are known in the history of the English law, and in the jurisprudence of this country;" and this is the view held by the supreme courts of some of the territories when considering the question as to the jurisdiction of justices of the peace, (*Moore v. Koubly*, 1 Idaho, 55; *Territory v. Flowers*, 2 Mont. 531;) and this seems to be the general rule, (*Byers v. Com.*, 42 Pa. St. 89; Sedg. Const. St. 491, note.)

If, in endeavoring to ascertain what jurisdiction can be conferred upon justices of the peace by territorial statute, we were guided wholly by what such jurisdiction was at common law, we would be forced to conclude that justices of the peace had no jurisdiction whatever of this class of offenses, for at common law they were not cognizable before a justice of the peace, but were indictable offenses, and infamous. 4 Bl. Comm. 64, 167; *People v. Sponsler*, 1 Dak. 289. But subsequently in England, and in the United States, such offenses have been by statute committed, in many instances, to justices of the peace, and such was the common practice in this country at the time when the laws of congress referred to in regard to this territory were enacted, but the penalties were generally limited to petty fines and short imprisonments.

We do not find it to have been a practice to invest them with power to inflict punishments as extensive or extraordinary as are sought to be conferred upon such officers by the territorial statutes we have referred to, and especially to grant to justices of the peace greater jurisdiction in criminal cases than in civil matters. If there were any such instances, they were exceptions to the general rule. It would hardly be claimed that the legislature could have invested justices of the peace with civil jurisdiction to the extent of \$300, or of any sum approaching it, had not congress in express language authorized it.

Neither do we think that the legislature could do so in criminal matters without some such express authority by congress; yet it is claimed in the case before us that the legislature can not only confer such jurisdiction in criminal matters, but can go further, and add imprisonment for a period of six months. We cannot think that congress ever intended to allow such legislation by the territorial legislature. *People v. Maxon*, 1 Idaho, 330.

It is, however, claimed that admitting the justice had no jurisdiction, yet that the writ of prohibition is not the proper process to reach the defect, as there was a remedy in the ordinary course of law, by appeal, and that this remedy was plain, speedy, and adequate. An appeal could be resorted to only after final judgment. It could not have stopped the proceeding in the justice's court. It could not have prevented the justice from forcing the petitioner into an unauthorized and illegal trial, nor from compelling him, if convicted, to take an appeal and give bond in at least double the amount of the fine, with at least two sureties, or, in default thereof, to go to jail, and yet, upon the appeal, the whole proceeding would have to be dismissed on the ground that the justice had no jurisdiction to hear the case, and, as a consequence, the appellate court could have none. There could be no trial of the merits in the district court because no such trial was authorized in the court below. *Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471; *Peacock v. Leonard*, 8 Nev. 84; *Stephens v. Boswell*, 2 J. J. Marsh. 29; *Brondberg v. Babbott*, 14 Neb. 519; S. C. 16 N. W. Rep. 845; *Wolcott v. Territory*, 1 Wyo. 67; *Cooban v. Bryant*, 36 Wis. 605; *Felt v. Felt*, 19 Wis. 199; *Stringham v. Supervisors*, 24 Wis. 594; *Barthelemy v. People*, 2 Hill, 257.

To compel a party to submit to being forced through this tedious and harassing routine of illegal proceeding and usurped jurisdiction is not only expensive and troublesome, but also vexatious in the extreme, and ought not to be allowed if it can be prevented. If there be no remedy by writ of prohibition in a misdemeanor case, by reason of there being an appeal, there is none in a felony case. In both the justice acts *coram non judice*, but the statute allows appeals from judgments of a justice in *all cases*. But an appeal would not be either a speedy or adequate remedy in either a misdemeanor or a felony case. A party charged with any offense has the right to have it investigated in a proper court, and in a legal manner, and cannot be compelled to submit to an illegal and unauthorized investigation. He has the right to a legal investigation, not only because the illegal investigation is in itself unjust, but also because the party is entitled to have a judgment that he may plead in any subsequent proceedings upon the same charge. No citizen should be arrested and prosecuted before a court having no authority to hear, try, or determine the case.

It will be observed that this is not a case where the justice has acted within the scope of his general jurisdiction, and in doing so has

merely exceeded his jurisdiction, but it is one where he has acted wholly "without" his jurisdiction. There is a total want of jurisdiction in him to hear, try, and determine the case. *Clary v. Hoagland*, 5 Cal. 476. Where a justice has general jurisdiction of the subject-matter, but has simply exceeded his jurisdiction, an appeal might be an adequate remedy, for in the appellate court the merits of the case could be examined into and the matter legally settled. *Ex parte Pennsylvania*, 109 U. S. 174; S. C. 3 Sup. Ct. Rep. 84; *Ex parte Gordon*, 104 U. S. 516. See, also, *Ex parte Ferry Co.*, 104 U. S. 519, and *Ex parte Hagar*, Id. 520; *Henshaw v. Supervisors*, 19 Cal. 150; *Clark v. Superior Court*, 55 Cal. 199.

But, as we have already seen, this cannot be done when the justice acts wholly without jurisdiction, for in that case the appellate court can have no more authority to try the merits of the case on appeal than the justice from whose judgment the appeal was taken. The trial then in the justice's court would be a solemn mockery of justice. The punishment of the party could only be hoped for where he would be unable to take an appeal, for if an appeal be taken the proceedings would be dismissed by reason of the want of jurisdiction in the justice. The judgment would not shield the party charged from subsequent arrest and prosecution for the same offense. No good purpose could be served. It would be a fruitless work. A justice of the peace cannot be given unlimited power. Nothing is presumed in favor of his jurisdiction; it must be shown affirmatively. It is no satisfaction to a citizen, when arrested and forced upon his trial before a court upon a criminal charge, to be told that, although the proceedings are wholly illegal and void, he will have to submit to it, because when it is all through with he can take an appeal to the district court, and there have the proceedings dismissed. If an injury would be then done him, why not dismiss at once, and save him from being harassed and criminally dealt with upon unauthorized prosecutions? It would seem to be the duty of an appellate court to check such proceedings at the earliest possible moment. If a party desired a trial *de novo*, and that can be had in the appellate court, an appeal might be deemed an adequate remedy; but where there cannot be a trial *de novo*,—a trial on the merits in the appellate court,—an appeal would be vain and fruitless. It would settle nothing concerning the subject-matter of the action. *Golding v. Jennings*, 1 Utah, 135; *Dill. Mun. Corp.* § 744, note 2.

The law does not limit a party to a process that will be fruitless when there is one that may prove available. *Paul v. Armstrong*, 1 Nev. 95, 96. The remedy, in the ordinary course of law, must not only be specific, adequate, and legal, but it must be one competent to afford relief upon the very subject-matter of the petition. *Fremont v. Crippen*, 10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 503; *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315.

An appeal in the case at bar would not be either a speedy or an

adequate remedy. When all the proceedings should be gone through with in the justice's court, and in the district court on appeal, the petitioner would be left just where he stands when he makes this application for the writ of prohibition. It would not relieve him from the stain of the charge, and yet would afford him no relief by a lawful investigation. The charge made against the petitioner is one that can be investigated by a grand jury, and if he be deemed guilty he should be indicted and punished; but, whether guilty or innocent, the law guaranties to him a legal investigation and trial, and these cannot be had in a court or before an officer acting wholly without authority of law. A party charged with an indictable criminal offense is, by the constitution, guarantied also a trial by jury. A pretended jury of six men is not a jury as known at common law, nor as contemplated by the constitution and laws of the United States. Such a jury is composed of 12 men. 3 Bl. Comm. 352; *Work v. State*, 2 Ohio St. 296; *Wynehamer v. People*, 13 N. Y. 378; *State v. Everett*, 14 Minn. 439, (Gil. 330;) *Vaughn v. Scade*, 30 Mo. 600; *Bowles v. State*, 5 Sneed, 360.

The prevailing doctrine now is that, although there be no jury in the inferior court, yet if by appeal a party may have a trial by jury, the constitutional guaranty of trial by jury is not violated. Dill. Mun. Corp. 367; Sedg. Const. 491, notes and cases cited. Where, however, a justice acts wholly without his jurisdiction, and there be no provision for a jury trial in his court, nor in the appellate court, the objection that there is no jury trial in the justice's court is not satisfied by the appeal. In the present case no jury is authorized in the justice's court, and none can be had in the district court, as the case would have to be dismissed in the appellate court without trial. No jury would be authorized in the district court, for the reason that no trial could be had there upon the merits. The justice having no jurisdiction to try the case, the district court could acquire none by the appeal, as we have already seen. Upon the whole case, therefore, we conclude that the justice was acting, and proceeding to further act, wholly without his jurisdiction, and that the petitioner had no plain, speedy, and adequate remedy in the ordinary course of law, and is therefore entitled to his writ of prohibition.

As the points we have considered are decisive of the case, it is unnecessary for us to examine the other questions raised by the petition.

The peremptory writ of prohibition is by the court allowed, with costs.

POWERS, J., (*concurring*.) Accusations of criminal conduct are tried at the common law by jury; and, wherever this right is guarantied by the constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury

trial, so far, at least, as they can be regarded as tending to the protection of the accused. A petit jury is a body of 12 men who are sworn to try the facts of a case as they are presented in the evidence placed before them. Any less than this number of 12 would not be a common-law jury, and not such a jury as the constitution guarantees to accused parties.

In the case at bar I think that the accused was entitled to a common-law jury,—that is, a jury of 12 men; and I agree with Judge BLATCHFORD (*Dana's Case*, 7 Ben. 1) that to require a defendant to be convicted by a judge, or by six men, in order to have a trial in another court upon appeal, is too much a mockery to be regarded as in any just sense a compliance with the constitutional guaranty. I do not think that the objection to the proceedings of the justice's court is removed by the fact that a man can appeal his case, and secure a jury trial in the court above. It does not seem to me to be good reason or good law to compel a man accused of crime to submit to the proceedings of an unauthorized tribunal, saying to him in the meanwhile: "Although you are being tried unlawfully, if you do not like the result you can have a trial before a higher court." I agree with counsel for the petitioner that "it is not an answer to say that a justice has jurisdiction, without the means to enforce it, by reason of not being supplied with a jury. A court cannot be said to have a jurisdiction which it cannot constitutionally exercise." Jurisdiction is the power to hear, try, and determine. A justice has no inherent power to summon a jury. He cannot summon one unless the statute authorizes the act. The statute directing a justice to summon a jury of six is a denial of his power to impanel any other number. It is in fact the exclusion of any jury, because six men are not a jury in a case where a common-law jury is required.

The writ of prohibition in the present case is asked to prevent an illegal trial of the case,—to prevent the injury resulting therefrom. An appeal after the injury sought to be prevented is committed is no remedy. For these reasons and others stated in the opinion of the court, I concur.

ZANE, C. J., dissents.

## SUPREME COURT OF IDAHO.

(2 Idaho [Hasb.] 239)

BRADBURY and another v. IDAHO &amp; OREGON LAND IMP. CO.

Filed March 8, 1886.

## 1. TRIAL—VERDICT—SPECIAL FINDINGS.

Where there is an inconsistency between the special findings and the general verdict of a jury, the special findings control the verdict.

## 2. MECHANIC'S LIEN—STATUTE STRICTLY CONSTRUED.

The mechanic's lien law must be strictly construed, and cannot extend beyond the express provisions of the statute.

## 3. APPEAL—RECORD—EXCEPTIONS TO RULINGS ON EVIDENCE.

Exceptions to the ruling of the court upon the admission and rejection of evidence may, when properly incorporated into a statement of the case having been used upon the hearing of a motion for a new trial, be considered, on an appeal from a judgment, in the same manner as when brought up by a bill of exceptions.

## 4. SAME—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Irrelevant evidence is not sufficient ground for a reversal of a judgment when it does not prejudice the cause of the party excepting to it.

Appeal from Second judicial district, Alturas county.

*F. E. Ensign*, for appellant, Idaho & Oregon Land Imp. Co.

*Huston & Gray*, for respondents, W. C. Bradbury and another.

BUCK, J. This action was brought to collect an acceptance for \$6,774.49, payable in 15 days from date, which had been protested, and was unpaid. The plaintiffs claim that said acceptance was given for a balance found due on settlement from defendant to plaintiffs for digging an irrigating ditch in Alturas county, Idaho territory; and pray the foreclosure of a mechanic's lien upon said ditch. The complaint also alleges that said ditch was dug upon contract, and sets out the contract therein. The answer admits the contract and the settlement, but alleges that, without defendant's knowledge or authority, the plaintiffs dug said ditch larger than the contract specified, and that the alleged settlement was made by them without knowing of said enlargement, and was procured by plaintiffs by fraud, and deny that a larger sum than \$500 was due thereon.

The case was tried by a jury, and the following special questions were submitted to the jury, and answered, to-wit:

"(1) Was the ditch constructed upon the survey made by the engineer in charge employed by the defendant corporation? *Answer.* Yes. (2) Did the dimensions of the ditch as laid out by the engineer in charge vary from the dimensions as stated in the written contract? *A.* Yes. (3) Were the changes and variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction? *A.* Yes. (4) Was there a settlement between the plaintiffs and defendant on the ninth day of June, 1883? *A.* Yes. (5) What amount was found to be due to plaintiffs from defendant upon such settlement? *A.* \$16,774.49. (6) Did the defendant, by its general manager, R. E. Strahorn, give its acceptance to plaintiffs for the sum of \$6,774.49 upon such settlement? *A.* Yes."

The jury found a general verdict that there was due plaintiffs \$4,274.49, and 20 per cent. interest from date of acceptance.

The court found several findings of fact, and the following conclusions of law:

"CONCLUSIONS OF LAW.

"(1) That the plaintiffs are entitled to a judgment for \$10,107.52; (2) that plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint; and it is so ordered."

The appeal is taken from the order overruling a motion for a new trial, and from the judgment, and is brought upon a statement of the case.

The record assigns as error—

"(1) That the first four findings of fact by the court are not sustained by any findings or special verdict of the jury; (2) that the court erred in making any finding of facts after the cause had been once submitted to a jury; (3) that the court erred in its first conclusion of law, in that it is in conflict with the general verdict of the jury, and because there is no finding of fact by the jury authorizing it; (4) that the conclusion of law that the plaintiffs were entitled to a foreclosure of the mechanic's lien is not supported by the evidence, in that the evidence does not show that it was filed of record within 30 days after the work was done, and that the notice itself shows that it was only intended as a lien upon a ditch as originally contracted for; (5) that the court erred in decreeing a foreclosure of the lien for the full amount, because the damages allowed for protest are not secured by the lien."

There are also other alleged errors which will be considered hereafter. The alleged error of rendering judgment for a different amount than specified in the general verdict seems not well taken. Section 385 of our Code provides that where special findings of fact are inconsistent with the general verdict, the former control the latter, and the court must give verdict accordingly. There is an inconsistency between the special findings of fact and the general verdict, but the judgment is in accordance with the special findings, and is valid under said section of the Code.

The alleged error that the conclusion by the court that the plaintiff was entitled to the foreclosure of his mechanic's lien was error seems not well taken, as the evidence shows the plaintiffs to have been original contractors, and entitled to 60 days in which to file their lien.

The objection to the decree of foreclosure on the ground that the lien, if allowed, could not cover damages for protesting the acceptance, seems well taken. The lien exists only by force of the statute, and cannot exceed the express provisions thereof. Section 815 of our Code provides that the lien is for work, labor, or material done and furnished, and section 827 allows the lien to extend to moneys paid for filing and recording the same. It cannot be extended beyond these items. 1 Jones, Mortg. § 360; Phil. Mech. Liens, § 204.

In the statement of the case are several exceptions to the ruling of the court in the admission or rejection of evidence. It is maintained

by respondents that such exceptions can only be brought up on a bill of exceptions. Section 413 of the Code, subd. 3, provides that if a motion for a new trial is to be made upon a statement of the case, the moving party must prepare the statement. When the notice of motion designates errors in law occurring at the trial as the ground relied on in the motion, the particular errors relied on shall be specified therein. The Code seems to make no distinction between the errors to be brought up in a bill of exceptions and on a statement. It seems to leave it optional with the aggrieved party as to which method he will adopt. A statement of the case can only be made upon a motion for a new trial. Upon a simple appeal from the judgment no statement is authorized. A statement once made may be used on appeal from a judgment, under section 653 of the Code, and, under the authorities, it seems that a statement can be so used on an appeal from a judgment *only* when first used on a motion for a new trial. Hayne, New Trial, § 254. In other respects a statement and bill of exceptions are similar. *People v. Crane*, 60 Cal. 279; *People v. Lee*, 14 Cal. 510; *Purdy v. Steel*, 1 Idaho, 216; *People v. Hunt*, Id. 436. We are of the opinion that exceptions to the ruling of the court in admitting or rejecting evidence may be considered on a statement, where a statement is authorized, the same as in a bill of exceptions.

Examining these alleged errors, we find that the rulings of the court sustaining objections to certain questions specified in the fifth assignment of error are in harmony with established rules of evidence. The first question is, "What conversation, if any, was had at the time of making the contract?" The written instrument itself contains the final result of their conversation, and what they said outside of it was immaterial. "(2) Did you inform plaintiff Bradbury that you had no authority to contract for a larger ditch than that specified, and that a different contract would not be ratified?" The issues made by the pleadings were, was the ditch dug and accepted? The preliminary conversations of parties would be irrelevant to these issues, and were properly rejected. The evidence admitted under objections in assignments of error Nos. 1, 2, 3, and 4 went, generally, to the progress of the enterprise, and, while apparently not relevant to the chief issue of the acceptance of the ditch as completed by the defendant, we cannot see that it in any way prejudiced defendant's case.

We think the instructions present the issues in the case fairly to the jury, and that no matter material to the appellant's cause was omitted.

Judgment affirmed as to judgment, and decree for foreclosure of lien modified by striking from the amount the penalty for protest.

HAYS, C. J., and BRODERICK, J., concurring.

(2 Idaho [Hasb.] 245)

## McCARTY v. BOISE CITY CANAL CO.

Filed March 8, 1886.

## 1. WATERS AND WATER-COURSES—NEGLIGENTLY ALLOWING WATER TO ESCAPE FROM DITCH TO LAND OF ANOTHER.

A person owning a ditch from which water escapes upon the premises of the adjoining land-owner, who allows such water to continue to escape from his ditch after notice, without any effort to prevent the same, cannot escape liability for damage done thereby on the ground that the adjoining land-owner might, at a slight expense, have prevented any damage by digging a ditch on his land that would have conducted said water off his premises.

## 2. NEGLIGENCE—CONCURRING NEGLIGENCE.

A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury.

Appeal from Second judicial district, Ada county.

*Brumback & Lamb*, for appellant, Boise City Canal Co.

*Huston & Gray*, for respondent, Martha McCarty.

Buck, J. The defendant is a corporation existing under the laws of Idaho territory, organized for the purpose of digging and operating a ditch for irrigation. The ditch is constructed across the farm of plaintiff. The complaint filed June 17, 1884, alleges, in substance, that during the years 1883 and 1884 the plaintiff's land had been damaged by water escaping from the ditch and running upon it during said years, and prior thereto, through defects in the same, and by carelessness and mismanagement in operating the same, in the sum of \$400. The defendants, answering, allege, among other things, that said damage, if any, was the result of the carelessly and negligently flowing water thereon by plaintiff, and from rains and floods, and deny all the allegations of the complaint. The cause was tried by a jury, who found a verdict for plaintiff, and assessed her damages in the sum of \$150. The appeal is taken from the judgment, and from the order overruling a motion for a new trial. A bill of exceptions is incorporated in the record.

The first assignment of error is that the verdict is unsupported by the evidence in that the evidence is not sufficient to prove that water in sufficient quantity to injure the land of plaintiff ever escaped through or over defendant's ditch upon the same. The second error assigned is that the evidence shows that whatever damage was done to plaintiff's land was done by irrigating land above plaintiff's land, by others than defendant, and by the plaintiff's careless irrigating of her own land surrounding the portion alleged to have been injured. Evidence upon both of these propositions was submitted to the jury, and it was their especial province to determine its weight and credibility. Except in the absence of all evidence, we cannot disturb their findings thereon.

The third alleged error is the refusal of the court to allow the defendants to show that, at a small expense on the part of plaintiff, any surplus water that may have come from defendant's ditch could have been conducted off of the land of plaintiff, so that the same would do her no harm. This proposition involves the main issue of the appeal. The important question is, what are the relative duties and obligations of the ditch-owners and the owners of the land through which the ditch runs?

It is admitted that the alleged overflow and seepage had continued with the knowledge of defendants for at least a year; that the plaintiff had notified the defendants of the alleged defects in their ditch, and offered to repair the same so that no water should escape therefrom upon her premises for \$25, and that the defendant had declined said proposition. The theory and claim of defendant is that the plaintiff was under a legal obligation to dig a ditch upon her own premises, if it could be done at a small expense, and thus conduct the said seepage from defendant's ditch off from her land. If this be true, then it results that ditch-owners have such a dominion over the lands through which their ditch is located as gives them not only a right of way for lateral ditches to conduct off water escaping from their main ditch through the adjoining land, but also that such escape ditches shall be maintained by such adjoining owners, providing that it can be done at a small expense. We do not understand that the doctrine relied on can be extended so far. The plaintiff is entitled to control her own premises. *Flynn v. San Francisco & S. J. R. Co.*, 6 Amer. Rep. 595; *Yik Hon v. Spring Valley W. W.*, 65 Cal. 619; S. C. 4 Pac. Rep. 666; *Burroughs v. Housatonic R. Co.*, 38 Amer. Dec. 75; *Philadelphia & R. R. Co. v. Hendrickson*, 21 Amer. Rep. 97; *Fero v. Buffalo R. Co.*, 22 N. Y. 209; *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Kellogg v. Chicago & N. W. Ry. Co.*, 7 Amer. Rep. 69.

We understand the rule to be that where one person suffers injury by the carelessness of another, occurring unexpectedly, and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage, if a temporary expedient or slight expense will do so; but if the one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense. *Shear. & R. Neg.* §§ 25, 28, 31, 36; *Kerwhack v. Cleveland, etc., R. Co.*, 62 Amer. Dec. 246; *Beach, Neg.* §§ 13, 18, 64; *Richmond & D. R. Co. v. Anderson*, 31 Amer. Rep. 750; *Railroad Co. v. Jones*, 95 U. S. 439; *Gould v. McKenna*, 27 Amer. Rep. 705; *Whart. Neg.* 74-78; *Fruler v. Sears Union Water Co.*, 12 Cal. 556; *Cooley, Torts*, 679; 4 *Wait, Act. & Def.* 718; *Snyder v. Pittsburgh*,

*C. & St. L. Ry. Co.*, 11 W. Va. 37; *Richmond & D. R. Co. v. Medley*, 40 Amer. Rep. 734.

The appellants assign the giving of the first six instructions on behalf of plaintiff, and the refusal to give the first, second, and third instructions asked for by defendant, as error. The objection to these instructions given, and to the refusal to give the first and second asked by defendant, are based upon the theory that the plaintiff was guilty of negligence. We think that the evidence offered by defendants themselves, and the admissions of defendants, show that plaintiff did all that could legally be required of her, and there was no evidence of negligence to justify the instructions refused, or the rejection of those given. Had plaintiff failed to notify defendants of the defects in their ditch, and thus allowed the damage to continue and increase to her knowledge, when the defendants were ignorant of its cause, or had there been a sudden break in the ditch, which, by a temporary expedient, at a slight expense, the plaintiff might have repaired, and thus have prevented the damage, the doctrine of negligence would apply. But in this case we think there was no error in giving or refusing said instructions.

The third instruction asked for by defendants, and refused, is as follows:

"The defendant is not liable for damages that may have resulted from rains or floods, or from damages that may have resulted from the acts of other parties in irrigating higher grounds, or from water standing above the ditch of defendant, and percolating through the soil, and accumulating on land of plaintiff; nor from breaks in the banks of the ditch of defendant, if defendant used such care in constructing, operating, and repairing its ditch as a prudent man would use if his own property were exposed to damage."

The first proposition in this instruction, though good in a case where there was no question as to water from defendant's ditch contributing towards the damage, is hardly applicable to this case. There seems to be no question that water escaped from the defendant's ditch, and, at best, mingled with the waters from other sources, if such there were. But the fact that others were also liable would not excuse the wrongful negligence of defendant. *Cooley, Torts*, 684; 4 *Wait, Act. & Def.* 719. We think the second part of the instruction not applicable, for the reason that defendant's own testimony shows that they allowed the water to run without using adequate means to stop it, upon the theory that the plaintiff might avert the damage at a slight expense, and that it was her duty to do so.

The appellants allege as error the refusal of the court to strike out certain findings of fact and conclusions of law. The first finding objected to seems to be necessarily included in the general verdict of the jury, and can result in no harm to defendant, and the others were within the province of the trial judge, and bear upon the matter of the injunction. As to the remaining alleged error, to-wit, the granting of the injunction, we are of the opinion that this remedy is not

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necessary to protect the rights of the plaintiff, and is of doubtful utility.

The judgment is affirmed as to damages, and reversed as to granting the injunction.

HAYS, C. J., and BRODERICK, J., concurring.

## SUPREME COURT OF OREGON.

(13 Or. 350)

ROHR v. BAKER.

Filed April 12, 1888.

## MISTAKE—COMPENSATION—SERVICES.

A contractor having, by mistake, performed certain work upon a contract undertaken by another, cannot recover of the latter for the work performed unless he proves assent, either express or implied.

The parties in this action were several street contractors with the city of Portland for excavating earth. Rohr, by mistake, and without Baker's knowledge, excavated a quantity of earth on ground covered by Baker's contract. Baker completed his contract, and received the contract price. Rohr brings this action to recover for the actual cost of the work done by him, and for which he claims Baker received the benefit.

*Yocum & Beebe*, for appellant.

*Stott & Stott*, for respondent.

WALDO, C. J. "An agreement concerning things personal is a mutual assent of the parties." Plowd. 5. There may by circumstances from which a tacit assent may be inferred, but in every case this assent is a fact which must be proved. No man can make another his debtor against his will; as, if a man pay my debt without my request, I am not bound to repay him.

In *Bixby v. Moor*, 51 N. H. 403, the court say:

"It is sometimes said that the law implies an agreement. Strictly speaking, this is inaccurate. The agreement, though not fully expressed in words, is nevertheless a genuine agreement of the parties. It is 'implied' only in this: that it is to be inferred from the acts or conduct of the parties instead of from their spoken words. The engagement is signified by conduct, instead of words. But acts intended to lead to a certain inference may 'express' a promise as well as words would have done."

There is a class of so-called contracts, *e. g.*, innkeepers and common carriers, which are not contracts at all. Poll. Cont. 10; *Hertzog v. Hertzog*, 29 Pa. St. 465; 2 Kent, Comm. (13th Ed.) 450, note 1. This is not a case of that class. Rohr must bring himself within the domain of actual contract. Now, Baker's contract was entire. He had property in it with which no man could interfere and claim any part of the contract price without his assent. Parsons says, (1 Cont. 446:) "If the work or service rendered is merely gratuitous, and performed for the defendant without his request or privity, however meritorious or beneficent they may be, they afford no cause of action." *Bartholomew v. Jackson*, 20 Johns. 28, is cited in the note. The case, presented is that of a stranger doing work on Baker's contract without Baker's consent. The case, in principle, is the same as though

he had plowed Baker's field, or done work on his house, under similar circumstances. See *Davis v. School-dist. No. 2*, 24 Me. 349, 351; *Day v. Caton*, 119 Mass. 513.

The judgment must be affirmed.

(13 Or. 352)

**HONEYMAN v. OREGON & C. R. Co.**

Filed April 13, 1886.

**CARRIERS—PRIVATE CARRIAGE OF DOGS—ACTION FOR DEATH.**

A common carrier who does not assume to act as such in the carriage of dogs, but upon the request of a party consents to carry a dog on a particular occasion, cannot be sued as a common carrier for the subsequent death of the dog while under his charge, even though money may have passed to defendant's agent for the carriage. The action must be upon a private contract, if recovery is sought.

*A. C. Emmons*, for appellant.

*E. C. Brounagh*, for respondent.

LORD, J. This is an action brought by the plaintiff against the defendant as a common carrier to recover damages for the alleged killing of a dog delivered to the defendant to be transported by its railway from Portland to North Yamhill. The complaint is in the usual form against common carriers, and the substance of the allegation is that, in consideration of the sum of two dollars, the defendant received of the plaintiff four dogs, to be safely conveyed by its railway from Portland to North Yamhill, but that the defendant so negligently conducted itself in carrying said dogs that one of them was injured, and thereafter died, to the damage of the plaintiff in the sum of \$200. The answer of the defendant admits its incorporation, and that it is a common carrier, but denies all other material allegations of the complaint; and sets up as a separate defense, in substance, that it is not a common carrier of dogs, and that it is and was then contrary to the regulations of the defendant to carry dogs on its train for hire; that the plaintiff was a passenger on the defendant's train, and had in his possession four dogs, which he delivered to the baggage master, who charged him the said sum as his compensation for taking care of the dogs, but that none was charged or received by the defendant for the carrying or transporting of said dogs, and plaintiff, being so notified, delivered said dogs to the baggage master under such regulation and understanding. Issue being taken by the reply, a jury was impaneled and sworn, and, after hearing the evidence of the plaintiff, the defendant moved the court for a nonsuit upon the ground that the plaintiff had failed to prove a cause sufficient to be submitted to the jury. The motion for nonsuit was allowed, and judgment was rendered against the plaintiff, from which this appeal was taken.

A common carrier is one who undertakes, for hire or reward, to transport the goods of those who choose to employ him, from place

to place. Story, Bailm. § 495; Lawson, Cont. §§ 1, 2; Kent, Comm. 598; 1 Smith, Lead. Cas. Mar. 312. At common law a common carrier was bound absolutely to safely convey all goods intrusted to his care. "He hath his hire," says Lord Coke, "and thereby implicitly undertaketh the safe delivery of the goods delivered to him," (Co. Litt. 89*a*;) and in default of this, the carrier is liable and bound to answer for whatever loss or injury may happen to such goods, unless occasioned by the act of God, the public enemy, or the fault or misconduct of the plaintiff. 1 Smith, Lead. Cas. 315. See, also, Lawson, Com. Carr. § 3. He is regarded as an insurer of the property committed to his charge, which "results from the law applied to a particular relationship, and not from a special contract to insure." In the celebrated case of *Coggs v. Bernard*, Holt, C. J., said: "This is a political establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sort of persons, that they may be safe in their way of dealing." 2 Ld. Raym. 918.

As such a common carrier's employment is public, and necessarily involves the performance of public duties, his duty to carry safely the goods or property intrusted to his charge is an obligation imposed upon him by law. "This is an action," said HOLROYD, J., "against a person who, by the ancient law, held, as it were, a public office, and was bound to the public. This action is founded on the obligation of the law." *Ansell v. Waterhouse*, 2 Chit. 1; *Forward v. Pittard*, 1 Term R. 27. In consequence of this obligation to transport safely which the law imposes, the burden of proof rests on the carrier to relieve or excuse himself from liability whenever a loss or injury happens. It is sufficient for the plaintiff to prove that the defendant received the goods and failed to deliver them safely. When this is done, a *prima facie* case of negligence or misconduct is established against the defendant. The complaint of the plaintiff charges the defendant in his capacity as a common carrier, and the contention of counsel for the plaintiff is that, upon the facts as disclosed by the record a *prima facie* case of negligence or misconduct was made out which required an explanation from the defendant to exempt itself from liability. He bases his argument upon the ground that the liability of a common carrier, at common law, for the delivery of live animals, is the same as that for the delivery of other property, unless modified by special agreement.

In some of the states—notably Michigan—the carriers of live-stock are not regarded as common carriers unless they have expressly assumed the responsibilities of common carriers by special contract. *Michigan Southern & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329; *Rorer*, R. R. 1300-1309. "But in most of the states," says Mr. Lawson, "the carriers of living animals are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise,

subject to explanation as to loss or damage caused by animals to themselves and to each other." Laws. Cont. 17, and note of authorities. There is no doubt that there is some controversy in the judicial mind whether, in the conveyance of live-stock, the duties and liabilities of the common law attach to the carrier, or whether the carrier, in the absence of a special contract, is to be regarded as the bailee or special agent for the transportation of such property, bound only to furnish suitable and safe carriage and motive power, and liable only for defects in these. For the authorities upon this subject, see Whart. Neg. §§ 615-621. But, for the purpose of this case, we shall assume that when the carrier undertakes the transportation of live-stock he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of the property, and that, unless modified by special contract, his duties and liabilities as common carrier for the delivery of such live-stock are the same as those which the common law attaches to the delivery of other goods or merchandise. *Kimball v. Railroad Co.*, 26 Vt. 247; *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531; *Kansas Ry. Co. v. Nichols*, 9 Kan. 235. Yet it is not perceived how, upon the record made in this case, it can avail the plaintiff. The evidence submitted and included in the bill of exceptions does not prove the duty or undertaking as alleged. The facts disclose that the defendant did not hold itself out as a common carrier of dogs, or assume their transportation in that character, but that the defendant expressly refused to accept hire and furnish tickets for their transportation. The evidence shows that when the party having in charge the dogs applied to the ticket agent of the defendant for transportation for himself and dogs that the agent refused tickets for the dogs, and referred him to the baggage master, who told him: "You know the rules about dogs;" but, as an accommodation, consented to take the dogs in his car, and promised to look after them, for which he received two dollars. These circumstances do not show that it was the business of the defendant to carry dogs, or to receive pay for their transportation, but that, as a matter of accommodation to a passenger, it permitted the baggage master, after the party was notified of the rules, to carry them in his car, and to accept pay for his care of them.

It is true, as Mr. Justice BRADLY said: "A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry." *Railroad Co. v. Lockwood*, 17 Wall. 357. Even in this view, if the arrangement, under the circumstances, made with the baggage master, may be construed to have any binding effect upon the defendant, the defendant can only be charged as a private carrier, or bailee, who undertook to carry what the facts show was not its business to carry, as a matter of accommodation, under a special arrangement. In such a case,

as ISHAM, J., said, "the relation is changed from a common carrier to a private carrier, and when such is the effect of the special agreement, they are not liable as common carriers; neither can they be declared against as such. It is possible there has been a breach of that express contract, and the plaintiff is, perhaps, entitled to damages for the injuries he has sustained; but the action should have been brought on that contract, or for a breach of duty arising out of it, and not on the duty and obligation imposed on common carriers." *Kimball v. Rutland R. Co.*, 26 Vt. 249. The complaint must set out the facts of the undertaking or duty as it is. A plaintiff cannot declare upon one undertaking, duty, or obligation, and recover upon another. So that in any view of the facts, as presented by this record, there would seem to be no error, and the judgment must be affirmed.

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(13 Or. 358)

GERDES and others v. SEARS.

Filed April 13, 1886.

SHERIFF—FAILURE IN DUTY—RETURN OF ATTACHMENT—ACTION.

A sheriff is liable in damages to a party aggrieved by his failure in official duty by not returning an attachment.

*F. V. Drake*, for appellants.

*Raleigh Stott*, for respondent.

BY THE COURT. The appellants commenced an action in the court below against the respondent for an alleged breach of official duty as sheriff of said county. In their complaint therein filed they set forth that theretofore they commenced an action in said circuit court against one T. W. Stapleton, to recover a judgment against him for \$336.45, and procured to be issued therein a writ of attachment against the property of the said Stapleton, which was duly delivered to the respondent, as such sheriff, for service; that at the time said Stapleton owned and possessed personal property in said county, not exempt from execution, and subject to levy under said writ, sufficient to fully satisfy such demand; that said respondent as such sheriff, under and by virtue thereof, did seize, levy upon, and take into his possession personal property of said Stapleton sufficient to satisfy the demand; that such proceedings were thereafter had in said action that a judgment was recovered in said court in their favor, and against the said Stapleton, for said sum of \$336.45, and costs; and that said judgment, among other things, directed and ordered the property attached to be sold, and the proceeds thereof to be applied to the satisfaction of said judgment; that after the levy of attachment by the respondent the appellants frequently made request to the respondent that he return said writ, with the proceedings indorsed thereon, to the clerk of the said court, together with an inventory of the property so attached, which he neglected and refused to do, and subsequently

delivered the writ over to his successor in office without any indorsement or certificate of his proceedings thereunder; and at all times has failed, neglected, and refused, and did still fail, neglect, and refuse, to make an assignment or delivery of any part of the property so levied upon by him under the said writ; that an execution had been issued upon their said judgment, and returned unsatisfied, except as to \$31.80; that by reason of the said neglect and default of the respondent, the appellants had been deprived of means to obtain judgment, or satisfaction of their said judgment, to their damage in the sum of \$347.15; for which sum they demanded judgment against the respondent. The respondent filed an answer to the complaint, controverting the material allegations alleged therein, and the issues so made came on for trial by jury.

The appellants attempted to prove facts to maintain the issues upon their part, but were not allowed to do so by the court, upon the ground, as we understand, that the appellants' judgment and order of sale did not describe the property to be sold with sufficient certainty, and that this was a waiver of the lien of attachment. We are unable to agree with the circuit court in this view. The gist of the action was the alleged violation of the respondent's official duty as sheriff, whereby the appellants claim to have been injured. The imperfect description of the property attached, in the judgment and order of sale, may have been occasioned by the neglect of the respondent to return the writ of attachment. His counsel contends that he was not compelled to return the writ when requested by the appellants; but this we do not know. Whether he was or not depended upon whether it had been executed. The statute provides that the writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as shall be sufficient to satisfy the plaintiff's demand. Civil Code, § 145. Section 147 of the Civil Code provides that the sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ, certified by the sheriff. Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody, and other personal property by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, etc. And section 160 provides that when the writ of attachment shall be fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced.

It necessarily follows from these several provisions of the statute that it is the duty of the sheriff, in such a case, to execute a writ of at-

tachment without delay, by attaching the property of the defendant therein as mentioned, and thereupon make return of his writ, with his proceedings indorsed thereon. A failure upon the part of a sheriff to comply with the law in the respect mentioned would be a neglect of duty for which he would be responsible to a party injured in consequence thereof. The statute referred to does not specify any definite time in which a sheriff shall so return the attachment, but its language is mandatory, and if he were to fail to make such return within a reasonable time the liability would attach. It is highly important that a sheriff should promptly execute and return a writ of attachment. More specially so since the amendment of 1878, requiring that the judgment direct the sale of attached property, as there is no way of ascertaining what property has been attached except from the return of the sheriff; and that he is liable, in consequence of a failure to perform an official duty, for damages to a party resulting therefrom, is too well established to require any citation of authorities to prove.

The questions to be tried in this case were whether or not the respondent, as such sheriff, performed his duty in regard to the service and return of the writ of attachment as prescribed by the statute? and, if he did not, what damages resulted to the appellants in consequence of his neglect in that respect? The respondent's counsel dwelt with much apparent earnestness upon the fact that the writ of attachment was only to be returned when it should be fully executed; but it must be understood that it is fully executed when the sheriff has attached all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses, and he is required to do this without delay. As soon as that is done, he must return his writ, retaining in his custody all property taken by him that has not been sold as perishable property, or that has not been delivered to the defendant, or third person claiming it, and an undertaking given as provided by section 152, Civil Code. The property in the hands of the sheriff is in *custodia legis*, and it is not necessary that the writ should remain in his hands in order to hold the property.

The case will have to go back, and the issues tendered by the parties in their pleadings be tried. The appellants' action is not barred or affected in consequence of any imperfect description of the property attached in the judgment or order for its sale. The question is whether the respondent improperly neglected to make a return of the writ of attachment, and turn the property attached over to his successor, and whether the appellants were damaged in consequence of such neglect.

(13 Or. 341)

## PRETTYMAN v. OREGON RY. &amp; NAV. CO.

Filed April 7, 1886.

## 1. CARRIERS—CARRIER OF GOODS—FAILURE TO DELIVER—MEASURE OF DAMAGES—MARKET VALUE.

When property has a market value which has been destroyed, and for which a recovery in damages is sought, the inquiry is as to the market value of such property, and in such case that value is the measure of damages.

## 2. SAME—PROPERTY WITHOUT MARKET VALUE—VALUATION.

For the want of a market value, to recompense a party for the injury sustained by the loss of property, other means of valuation must necessarily be resorted to in order to appraise the property which is subject to judicial valuation.

*C. B. Bellinger*, for appellant, Oregon Ry. & Nav. Co.

*A. S. Bennett*, for respondent, Prettyman.

LORD, J. This is an action brought by the plaintiff to recover damages from the defendant for failure, as a common carrier, to deliver a box of pear grafts alleged to have been shipped over defendant's lines. Upon the conclusion of the plaintiff's testimony the defendant moved for a nonsuit on the ground that the plaintiff had failed to make out a case sufficient to be submitted to the jury. The motion was denied. The jury found a verdict for the plaintiff, upon which the court rendered judgment. The denial of the motion for a nonsuit is the ground of the appeal. Among other things, it is alleged in the complaint, in substance, that at the time of the arrival of the grafts at Portland they had no market value, there being none in the market at that place, or within a long distance, but that for general and ordinary purposes the said grafts were of the reasonable value of \$500, etc. The contention of counsel for the defendant was to the effect that there could be no general value, except a market value, and that any other value would be necessarily special, and hence the error.

When property has a market value which has been destroyed, and for which a recovery in damages is sought, the inquiry is as to the market value of such property. In such case, the market value of such property is the proper measure of damages. It furnishes the standard by which the damages may be ascertained and measured; for the money value thus ascertained is the price at which property could be replaced for money in the market. But property may have a value for which a recovery may be had if it is destroyed, although it may have no actual market value. "There may have been no sales in that region," said VALENTINE, J; "there may have been no market value for the corn there. If so, then some other criterion of value must be adopted. It is not necessary in any case that there should be an actual market value for an article in order to entitle the owner thereof to a recovery for its destruction." *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 380.

And in *Murry v. Stanton*, 99 Mass. 348, the court say:

"Property is often the subject of such legal valuation, for which no proof of value in the market could be given, because it is not bought in the course of trade, and it is not known in the market, and is therefore incapable of any estimate in that mode. In such case the real value is to be ascertained from such elements as are attainable. The promissory note of an individual may have no market value, but proof of the solvency of the maker, that the note is secured on real estate, in whole or in part, would require that some value, according to the fair estimate of its probable proceeds, should be put upon it. \* \* \* When there is 'a market value' it shows the price at which either party may have relief from the consequences of the default of the other, and therefore it properly measures the damages. But when there is no such standard, the damages must be estimated from other means of valuation."

For the want of a market value, to recompense a party for the injury sustained by the loss of property, other means of valuation must necessarily be resorted to in order to appraise the property which is the subject of judicial valuation. The bill of exceptions discloses that the evidence submitted was in conformity with this principle, and was competent for the purpose offered. There was no error, and the judgment must be affirmed.

(13 Or. 287)

### STATE v. COUNTY OF MULTNOMAH.

Filed March 22, 1886.

#### 1. TAXATION—FIXING AMOUNT—DUTY OF LEGISLATURE—LIMITATION—COUNTIES, HOW BOUND.

It is the duty of the legislative assembly to provide no more than an amount of revenue sufficient to defray the necessary expenses of the state for the fiscal year. The determination of a proper estimate, within this limitation, is left to that body, and upon its fixing a rate per cent. of tax to be levied, it is conclusive upon the counties.

#### 2. SAME—ASSESSMENT—COUNTIES—POWERS.

The counties have control of the entire machinery for assessing and collecting the tax, and ought to be responsible for a failure to secure the full amount levied. Any serious failure in the matter may be relieved against by the legislature, while the courts have no alternative but to enforce the law as they find it on the statute books.

#### 3. SAME—RECOVERY BY STATE FROM COUNTY—INTEREST.

There can be no interest allowed upon recovery by the state of a balance of the proportion of taxes due from such county to the state.

*Raleigh Stott and Samuel Stott, for appellant.*

*P. L. Willis, for the State.*

THAYER, J. This appeal comes here from the circuit court for the county of Multnomah, from a judgment rendered in that court, upon an agreed case, in which the respondent was plaintiff and the appellant defendant. The following are the facts agreed upon between the said parties to said case:

"In the year A. D. 1883, at the time prescribed by law therefor, the defendant caused its assessor to duly make out an assessment roll of the taxpayers and taxable property in said Multnomah county, according to the provisions of the statutes of this state relating thereto, to serve and be used as a basis of taxation for revenue for the purposes of both of the parties hereto, for said year, and the county court duly examined, corrected, and approved

said assessment roll; and thereafter said county court levied a tax upon the taxable property of said county for state purposes, for said year of 1883, which tax amounted to the sum of \$98,857.38, and a tax which amounted to the sum of \$176,531.05, upon said property, for county purposes, for said year; and thereafter, and prior to the twenty-sixth day of December, 1883, the county clerk of said county, as by law in such cases provided, transmitted to the secretary of state of the plaintiff a certified copy of said assessment roll, under the seal of said county court; that on and by said assessment roll, after it was so corrected and approved, it appeared that the taxable property then in said Multnomah county was \$17,653,105; that upon receiving said copy said secretary of state duly estimated and ascertained the amount of tax to be collected in said county of Multnomah, for state purposes, for said year of 1883, and thereby found such amount to be \$98,875.38, and, as by law in such cases provided, made a statement thereof, and thereafter, on the twenty-sixth day of December, 1883, at Salem, Oregon, duly delivered a certified copy of such statement to the treasurer of state of the plaintiff, who recorded the same in a book kept for that purpose, and also then and there charged the defendant with \$98,875.38, the amount of tax so ascertained to be raised in said county of Multnomah; that prior to the first Monday of April, 1884, there had been duly collected and paid in to the county treasurer of said county, of said tax by said county court levied, more than the said sum of \$98,875.38; that no part of said tax has been paid by the defendant to the plaintiff, except the sum of \$92,647.51; that the aggregate amount of the taxable property in the state of Oregon, as it appeared on the assessment rolls of the several counties for the year 1883, certified to the secretary of state by the clerks of the several counties, was \$75,306,953; the total amount of tax necessary to meet and pay all the appropriations made by the legislative assembly of the state of Oregon for said fiscal year 1883 was \$392,500; that on the said assessment roll of 1883, upon which the said charge of state tax against the county of Multnomah was made by the state treasurer on the twenty-sixth day of December, 1883, for state purposes, for the fiscal year 1883, there were double assessments against land, by the same land being more than once assessed by said assessor in making said assessment roll; that the amount of state tax charged and levied against the said property so more than once assessed was \$356.72; that the sheriff and tax collector of Multnomah county, as provided by law, upon the discovery of said double assessment, collected only the taxes justly due thereon, and collected no tax thereon; that in making said assessment and assessment roll the assessor of said county, by mistake, returned as taxable property a greater amount than should have been assessed to certain persons therein named; that the state tax levied and charged in said roll against the property of said persons in excess of what should have been assessed against them amounted to \$91.23; that the sheriff and county court of said county prior to this date, and at the time appointed by law, duly remitted the said sum upon the said persons so overassessed, upon said persons duly making and filing their affidavits and lists of property liable to taxation in said county as provided by law; that the sheriff of said county was, on the fifteenth day of March, 1884, duly restrained by an order of the circuit court of the United States for the district of Oregon from collecting \$1,188.10 in said roll assessed and charged as state tax for the fiscal year 1883 against the Dundee Mortgage & Trust Investment Company, in a suit wherein said company was plaintiff and the sheriff of said county and others were defendants, and was so restrained until the fourth day of September, 1884, and on said day said court duly decreed and perpetually enjoined this defendant from collecting said tax; that the defendant has proceeded, at the times and in the manner provided by law, to collect the state tax levied and charged against property in Multnomah county in said assessment roll for the year 1883, and has in all things complied with the statutes in that behalf, and after due dil-

igence, and exhausting all legal remedies in such cases provided by law, has collected of said tax only \$92,647.51, which said sum has been paid to the state of Oregon by the county treasurer of Multnomah county long prior to this date; that after having complied with the law in all things as aforesaid, the sheriff and tax collectors of Multnomah county, on the first Monday in April, 1884, made out a statement, duly verified, of the taxes assessed on said roll then remaining unpaid, including therein a description of the land doubly assessed; that at the date of said sheriff's statement there remained due and unpaid and delinquent of the said state tax \$9,269.88; that thereafter the county clerk made from said delinquent tax roll a true and correct list of the taxes returned as unpaid, and a description of the lands and property therein assessed, and the names of the persons to whom said taxes were charged, and on the twenty-second day of April, 1884, delivered the same to the sheriff with a writ attached thereto, under his hand and seal of the county court, as by law required; that thereafter said sheriff proceeded under said writ as by law required, and duly levied upon all the personal property that could be found belonging to said delinquents, and upon the real property of the said delinquent tax-payers in said delinquent list described and duly advertised, and sold the same in accordance with law prior to the first Monday in July, 1884; that after having sold said property as aforesaid, and used due diligence in the execution of said writ, there remained unpaid and uncollected, and still remains unpaid and uncollected, of said state tax as levied and charged in said roll, \$6,209.87; and that no other property can be found by this defendant from which to collect said taxes."

Upon these facts the circuit court rendered the judgment appealed from, which included a principal sum of \$6,209.87, and interest thereon at the rate of 8 per cent. per annum from and after the seventh day of April, 1884, amounting to \$731.36, making in all \$6,941.23. The grounds of the appeal are that the court erred in deciding that the state was entitled to recover from the county either the principal sum or the interest. As stated in the respondent's brief—

"The mode of proceeding in the matter of the levy and collection of state taxes in Oregon, at the time the tax claimed herein was levied (1883) and became due, was as follows: The assessor of each county of the state made out an assessment roll (Code, p. 751, § 16, amended by Laws 1880, p. 51) to be used as a basis of taxation for revenue for state and county purposes for a year. The county judge, clerk, and assessor, as a board of equalization, (Code, p. 756, § 37,) met on the last Monday in August (Code, p. 752, § 19) and examined and corrected the assessment roll, (Code, pp. 756, 757, §§ 37-40.) The county court then, at its September term, re-examined, corrected, and approved the assessment roll, (page 760, § 54,) and estimated, determined, and apportioned or levied the amount of state and county tax required by law to be raised in the county, (page 760, §§ 55, 56.) Within forty days thereafter the county clerk transmitted to the secretary of state a certified copy of the corrected and approved roll. Page 760, § 59. Upon receiving such copy the secretary of state estimated the amount of state tax to be collected in the county, and made a statement thereof, and delivered a certified copy of such statement to the state treasurer, and the state treasurer then charged the county with the amount of the tax so ascertained to be raised. Page 761, § 60. On or before the first Monday of February next following the making of such charge the county treasurer was to pay over to the state treasurer the amount of state taxes so charged to the county. Page 766, § 80."

It is not claimed but that the statement made by the secretary of state of the estimated amount of the state tax, certified and delivered to

the state treasurer, and the amount charged the county of Multnomah by the state treasurer, referred to in the agreed statement of facts, was regular and correct upon the face of the proceedings. Unless, therefore, the appellant is allowed to go behind the proceedings, and claim a drawback on account of some matter *de hors* the record, the respondent's principal claim must be conceded to be valid. The appellant's counsel claims that the legislative assembly of the state has no right to provide for raising any more than sufficient revenue to defray the expenses of the state for each fiscal year, and to pay the interest on the state debt, if there be any; and that the \$92,647.41 paid by the appellant, as shown in the agreed statement, was more than its share of revenue necessary for that purpose, and to pay all deficiencies for the previous years as provided in section 6 of article 9 of the constitution; and that the state treasurer had no right to charge any more than that sum against the appellant. In my opinion, it is the duty of the legislative assembly to provide no more than an amount of revenue sufficient to defray the necessary expenses of the state for the fiscal year; that the constitution intends that no tax shall be levied to create a revenue beyond the necessary expenses liable to be incurred, and to cover any excess over the income of a previous year; that the authority of the legislative assembly is limited in that particular. But it is impossible to determine just what rate of taxation would cover the estimated expenses of a fiscal year. It would be very liable to produce a few thousand dollars too much, or not enough. If, however, it resulted in producing too much, it would not follow that a county could withhold paying over the amount in excess of its share. The constitutional limitation could not be enforced in that way, as it would cause confusion, and terminate in the counties paying over to the state no more than they deemed to be their share of the revenue necessary to defray its expenses for the fiscal year. That question must be left to the legislative assembly, and when it determines upon the rate per cent. of tax to be levied it is conclusive upon the counties.

The appellant's counsel also insisted that a rebatement should be made in favor of the appellant on account of the failure to collect the full amount of state and county taxes assessed, but the statute does not so provide. It requires the several county treasurers to pay over to the state treasurer, in gold and silver coin, the amount of state taxes charged to their respective counties, which tax shall be paid out of the first of such moneys collected and paid in to the county treasurer. Any other mode would occasion uncertainty in securing state revenues. The counties have control of the entire machinery for assessing and collecting the tax, and ought to be responsible for a failure to secure the full amount levied. Any serious failure in the matter may be relieved against by the legislature, while the courts have no alternative but to enforce the law as they find it upon the statute books. Circumstances often occur which occasion a hardship upon a county, but they are liable to happen in any

county, and, as between the counties, adjust themselves as equitably as they could be under any general rule of law. The state tax is comparatively insignificant,—does not amount to half the burden of school taxes in many of the districts in the state; and as the taxable property within the state increases, it will continue to be lessened if state affairs are prudently managed.

I am unable to discover that the appellant has any defense as against the payment of the principal sum claimed by the respondent. There is, however, a question as to whether interest can be exacted upon the sum that should have been paid over from the county to the state treasurer. "Interest" is defined to be a profit or recompense allowed to be taken from the borrower by the lender. Blackstone calls it a price or reward, concerning which he says: "Many good and learned men have, in former times, very much perplexed themselves and other people by raising doubts about its legality *in foro conscientie*;" but he seems to be of the opinion "that since all other conveniences of life may either be bought or hired, there is no greater oppression in taking a recompense or price for the hire of money than any other convenience, but that to demand an exorbitant price is equally contrary to conscience for the loan of a horse or the loan of a sum of money; that a reasonable equivalent, however, for the temporary inconvenience which the owner may feel for the want of it, and for the hazard of his losing it entirely, is not more immoral in the one case than in the other; that a capital distinction must be made between a moderate and exorbitant profit, to the former of which is given the name of 'interest,' to the latter the truly odious name 'usury,' which is well summed up by Grotius: 'If the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they never can make it just.'" 2 Bl. Comm. 455, 456.

Upon these principles interest is allowed to be taken by law, and the legislature has, from time to time, attempted to regulate its rate in order to prevent oppression and uncertainty. It is allowed where a rate has been stipulated in the given case within the limit authorized by the legislature, and is recoverable in other cases where damages are recovered, but is not allowed to be recovered in the latter case only by reason of withholding a debt, *ratione detentionis debiti*. The statute of the state provides that the rate of interest upon money after the same becomes due on judgment and decree for the payment of money; on money received to the use of another, and detained beyond a reasonable time, without the owner's consent, expressed or implied; or upon money due upon the settlement of matured accounts from the day the balance is ascertained; and on money due or to become due, when there is a contract to pay interest, and no rate speci-

fied. This statute was intended, doubtless, to cover every case of the allowance of interest; but its provisions are general, and must be construed in accordance with the reason of the law upon the subject. None of its provisions are applicable, in terms, to the case under consideration, unless it be the one providing for the allowance of interest "on money received to the use of another, and detained beyond a reasonable time without the owner's consent, expressed or implied;" and I am unable to discover how that could be applied within the principle upon which interest is allowed.

The provision alluded to evidently relates to cases where the money detained belonged to the party for whose use it was received, and it leaves the inference that the detention could have been consented to by the party. It is the ordinary case of neglecting to pay over money to a party to whose benefit it has been received, and interest is allowed for its use for the reason that the party entitled to it has been deprived of its use during the period of its detention, and, in contemplation of law, has suffered damages to the extent of such interest. The case, in fact, is nowise analogous to the one under consideration. The respondent was not the owner of the money. It was a legal contribution by the people of the county to assist in defraying the expense of administering the affairs of the commonwealth. It was a part of its revenue derived from taxation, and no more belonged to the state when in the hands of the county treasurer than when paid over to the tax collector. The state officials had power, and it was their duty, to compel its prompt payment, and that was the extent of their authority. Because they neglected their duty in that particular did not authorize them to exact interest,—they had no right to extend the time of its payment. In *Danforth v. Williams*, 9 Mass. 324, a tax collector who had neglected to enforce the payment of a tax claimed interest upon the tax for its non-payment after it was due; but the court refused to allow it,—said it would be offering a bounty for negligence if allowed. I cannot believe that the law will allow interest in a case when the parties having the management of the affair have no power to contract for the payment of interest. There can be no interest unless there is a debt, except where it is allowed as damages, and then the party recovers interest because he has been deprived of the use of the money or property from which he could have derived profit or saved loss; and a tax is not a debt. *Lane Co. v. Oregon*, 7 Wall. 71. I am unable to discover any principle upon which interest could have been recovered in the action, and apprehend that it would be bad policy to allow it in such a case. The interest allowed by the circuit court must therefore be remitted, otherwise the judgment appealed from will be affirmed. This will allow costs to the appellant on the appeal.

*SUPREME COURT OF COLORADO.*

(9 Colo. 80)

PEOPLE, etc., *ex rel.* SEELEY v. MAY, Treasurer, etc.

Filed March 26, 1886.

1. MUNICIPAL CORPORATIONS—COUNTY INDEBTEDNESS—CONSTITUTIONAL LIMIT—PARTIES INTERESTED—NOTICE OF THE LAW.

County authorities, as well as all parties dealing with them, must take notice of the limit which the people in their constitution have prescribed for county indebtedness.

2. SAME—WARRANTS—DEBT THEREBY INCREASED BEYOND CONSTITUTIONAL LIMIT.

In determining the amount of county indebtedness at any time county warrants are to be taken into the account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void.

*Mandamus.*

This was an original action in the supreme court, asking for *mandamus* on defendant to accept and receive a county warrant issued prior to July, 1885, in payment of county taxes. To the complaint defendant demurred, and, on argument, the court held that county warrants were in so far contracts of the county that when a law, in force at the time of their issuance, provided that such warrants should be received in payment of county and road taxes, a subsequent act providing that all such taxes should be paid in cash only was unconstitutional as to warrants issued prior thereto; that the effect of the law as to such warrants was to impair the obligation of the contract. *People v. Hull*, 9 Pac. Rep. 34, (December term, 1885.) On overruling the demurrer, defendant asked and obtained leave to answer.

The answer denies:

"(1) That the relator was the legal holder of the certain county warrant or order of said alleged county of Lake, No. 12, 119, mentioned and described in said petition and alternative writ, as alleged therein; that the said warrant or order was, on the ninth day of May, A. D. 1884, or at any other time before or since, for value received or otherwise, sold, assigned, transferred, or delivered to the said petitioner, and denies that the said petitioner was or is the owner of said county warrant or order, or entitled to receive payment therefor from the county treasurer of said county of Lake.

"(2) And for a second and separate defense to this action, and the matters and things alleged and set forth in the said relator's petition and the alternative *mandamus* herein, the said defendant and respondent, further answering, alleges that said supposed and alleged county warrant or order No. 12, 119, issued to William L. Ledford for \$15.40, mentioned and set forth in the said relator's petition and the alternative *mandamus* herein, was made and issued, or attempted to be made and issued, and the debt and obligation thereof assumed to be contracted, or attempted to be contracted, by the said county of Lake, in direct violation and contravention of the provisions of section six (6) of article eleven (11) of the constitution of the state of Colorado in such case made and provided, and at a time, to-wit, the fifth (5th) day of July, A. D. 1883, when the limitation of the aggregate amount of debt or indebtedness which could lawfully be contracted or incurred by the said county of Lake, for all purposes, as prescribed by said constitutional provision, had

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been reached and exceeded by said county, and in this, to-wit: *First*, that at said time the total valuation of the taxable real and personal property of said county of Lake was not less than one million dollars, (\$1,000,000,) and, in fact and truth, at such time such valuation, as assessed in pursuance of the laws of the state of Colorado, amounted to the sum of, to-wit, four millions two hundred and forty-one thousand five hundred and thirty-five dollars, (\$4,241,535;) *second*, that at said time the aggregate amount of the indebtedness of said county of Lake, for all purposes, exclusive of debts contracted before the adoption of the constitution of the state of Colorado, exceeded the sum of fifty thousand eight hundred and ninety-eight dollars, (\$50,898,) and, in fact, exceeded the sum of one hundred thousand dollars, (\$100,000;) and that at such time said indebtedness exceeded twice the rate upon the whole valuation of the taxable property, real and personal, of said county of Lake, as specified in and by said constitutional provision: by reason of all which the said county warrant or order is of no validity, force, or effect whatever against said county of Lake, and ought not to be received for, or in payment of, the taxes in said petition and alternative writ of *mandamus* mentioned and alleged."

*Teller & Orahood and Markham & Dillon, for plaintiffs.*

*Danl. E. Parks, Co. Atty., (H. B. Johnson, of counsel,) for respondent.*

ELBERT, J. We treat the first defense to the answer as amounting to a traverse of the allegations of the complaint, and do not notice it further.

The principal contention is over the second defense interposed. Its sufficiency is submitted on demurrer, and its determination requires the construction of section 6, art. 9, of the constitution. The section is as follows:

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to-wit: Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each \$1,000 thereof. Counties in which such valuation shall be less than \$5,000,000, \$3 on each \$1,000 thereof, and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than \$1,000,000."

Upon its face this looks like a plain limitation of the aggregate amount of county indebtedness, irrespective of its form. It is contended, however, with great earnestness and ability, that it is to be

regarded only as a limitation of county indebtedness "by loan." The leading considerations urged in this behalf we will notice in their proper place as we proceed.

The large interests indirectly involved, upon the one hand, and the importance of preserving inviolate constitutional limitations upon the other, demand a careful consideration of the question raised. Rules of construction have for their object the discovery of the true intent and meaning of the instrument to be construed. If applicable, they are supposed to lead to the truth; if not applicable, and are, notwithstanding, applied, they lead astray. If we reject any of the many rules appealed to in this discussion, it is not because they are unsound, but inapplicable. We place at the beginning of the inquiry a few familiar propositions, which, taken together, constitute what we regard as the leading and controlling rule which is to guide us in this case:

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning." Cooley, Const. Lim. 69, 70.

The article in which the section occurs is entitled "Public Indebtedness," and the section opens with a general and leading declaration that "no county shall contract any debt by loan, in any form." From this general prohibition, however, the section excepts loans "for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness, contracted in any one year, is limited by specified rates on the assessed valuation of taxable property. Having prohibited indebtedness "by loan," and provided for the exceptions named, the section follows with another and second general declaration, to-wit: "The aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not, at any time, exceed twice the amount above herein limited." To this general declaration there is also an exception, namely, when "the question of incurring such debt shall, at a general election, be submitted" to the qualified tax-paying electors of the county; and this power to vote an indebtedness is likewise limited by a fixed rate on the assessed valuation of taxable property. There is a provision that bonds, if any be issued, shall not run less than 10 years. There is also a provision that the section shall not apply to counties having a valuation of less than \$1,000,000.

We construe the section without reference to these last two provisions. If there be anything in their language hostile to the construction given to the rest of the section, it is not apparent. Seeking the meaning of the framers of the constitution from the words they have used, and giving these words their plain and ordinary signification, it is a fair analysis of the section to say that it consists of two leading declarations of legislative will, with exceptions to each: (1) "That no county shall contract any debt by loan, in any form," with the exceptions named; (2) "that the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not exceed at any time" a certain rate, with an exception named. While these two propositions are associated, they are none the less independent declarations,—independent for the plain reason that there are no words giving to either clause the character of a dependent or qualifying clause. This stands confessed when we are asked to supply a word giving to the latter clause the character of a qualifying sentence. True, we find the words "shall not at any time exceed twice the amount above herein limited;" but these are words of reference for the purpose of adopting a rate of limitation,—they in no wise qualify the language descriptive of the *thing* limited. The language used by the framers of the constitution expresses the meaning we have assigned it adequately, and with such precision as, in our opinion, leaves no room for reasonable doubt.

The construction given, is based on the plain terms of the section. Corroborative of this construction are some extrinsic facts worthy of notice. Prior to the year 1876, when our constitutional convention was in session, a provision limiting the aggregate amount of county indebtedness for all purposes, irrespective of its form, had become in the later constitutions a *customary* provision. County indebtedness was limited by the constitution of Iowa, (article 11, § 3,) adopted in 1857; of Illinois, (article 9, § 12,) adopted in 1870; of West Virginia, (article 10, § 8,) adopted in 1872; of Pennsylvania, (article 9, § 8,) adopted in 1873; of Wisconsin, (article 11, § 3,) adopted in 1874; of Missouri, (article 10, § 12,) adopted in 1875. We proceed safely when we assume that the members of the convention, as intelligent men, took the constitutions of other states as their guides in their work; and more especially the later constitutions, embodying, as they did, provisions based on nearly a century of experience. The omission from the constitution which they framed of a provision limiting county indebtedness would be more noticeable than its presence. This the more clearly appears, when we ascertain the fact that the members of the convention were very largely occupied with the question of the *honest* and *economical* administration of public affairs.

In an address to the people, issued by the convention upon its adjournment, they make prominent the many provisions of the constitution against extravagance in the different departments of the govern-

ment,—in the executive department, in the legislative department, and in the matter of public indebtedness. This address is an authentic memorial of the time, and its value consists, in this case, not only in the general light it sheds upon the situation, the direction of the efforts of the members of the convention, and the mischiefs guarded against, but in the mention made of the section which we are considering, and the article in which it occurs. They say:

“By the provisions of this article we have prohibited the legislature from lending the credit of the state in aid of any corporation, either by loan or by becoming a subscriber to any stock, or a joint owner with any party, except in case of forfeiture and escheat; also from assuming any debts or liability of any party; and have also required appropriations to be kept within the limits of our resources; and that no appropriations be made unless assessments are also made sufficient to meet them, and at the same session of the legislature. The same principles are applied to counties, cities, towns, and school-districts, as far as applicable, with an additional safeguard that to increase the indebtedness in excess of the rates fixed in this constitution, a vote of the people must be had thereon. In limiting the amount of indebtedness which may be contracted by counties, we have endeavored to make a classification that would not cripple counties having smaller resources, and at the same time restricting those of larger resources to prevent extravagance.”

Attention is here called to county indebtedness in language which points to a general limitation of all county indebtedness, irrespective of its form. Nothing is said of indebtedness “by loan.” On the other hand, the language is in accord with the language used in the section. It also discloses the legislative motives. The language is: “We have endeavored to make a classification that would not cripple counties having smaller resources, and at the same time restricting those of larger resources to prevent extravagance.” Associated with the intention to prevent extravagance is the desire not to cripple counties having “smaller resources.” Hence first the limitation, and then the classification upon the basis of taxable valuation, and the proviso “that this section shall not apply to counties having a valuation of less than one million of dollars.”

We do not care to assign to the language we have quoted any undue value as a specific interpretation of the clause in controversy. The language may not have been used with care and precision. The presumption that it was so used, however, is strengthened by the fact that the address was first prepared by a committee, among whom were able lawyers and jurists, and afterwards submitted to, considered and adopted by, the convention. It has the rank and character of a state paper issued to the people by their chosen representatives in convention assembled, at a most important period in their history, and upon questions of the first magnitude. Whatever its force, it supports the construction given. What we submit as unquestionable is this: that it discloses clearly an intention upon the part of the framers of the constitution to guard against extravagance in the matter of county indebtedness. It is worthy of note, in this connection, that

in many, if not all, of the states named, the constitutional provision limiting the aggregate amount of county indebtedness has been questioned upon like ground that it was intended to apply only to bonded indebtedness, and that the decisions have uniformly been adverse to the construction claimed. *City of Council Bluffs v. Stewart*, 51 Iowa, 385; S. C. 1 N. W. Rep. 628, and cases there cited; *Law v. People*, 87 Ill. 385; *Prince v. City of Quincy*, 105 Ill. 138; *Appeal of the City of Erie*, 91 Pa. 398; *Wisconsin, etc., Co., v. Taylor Co.*, 52 Wis. 37; S. C. 8 N. W. Rep. 833.

Many objections are urged by counsel for relator to this construction. It is claimed that there is an important difference between this section of our constitution limiting county indebtedness and the sections having a like object in the constitutions of the other states; that the words "by loan" are peculiar to the provision of our constitution, and show a different intent. In this behalf it is said that "section 6 must be interpreted as though the word 'such' had been inserted between the words 'all' and 'purposes,' in the tenth line of the section, so as to read: 'And the aggregate amount of indebtedness of any county, for all *such* purposes, exclusive of debts,'" etc. To this end the argument is largely directed, and it is plain to see that if this insertion of a word be admissible the section must be held to apply only to debts "by loan;" and it is equally plain to see that in order to so limit it the word "such," or some equivalent word, must be inserted in the line named.

Assuming, for the time and for the purposes of this inquiry, that the addition of a word to a section of the constitution, as contended for, is within the limits of judicial power and discretion, we examine some of the considerations urged that to do this is to declare and follow the real intention of the framers of the constitution:

1. We are told that otherwise the construction leads to an absurdity, in this: that the rate fixed is so low that county officials would be seriously embarrassed and crippled in the management of county affairs, and unable to provide for the ordinary expenses of the county. It is a full answer to this to say that this is a limit of indebtedness, and not a limitation of the amount that may be raised by taxation to meet the necessary current expenses of the county. It is simply a declaration that the county, within certain limits, shall live within its income, and not that its income shall be more or less. The limit of indebtedness fixed was a matter of judgment about which men might differ, and it is not for us to substitute our judgment for that of the convention. Having fixed a lawful margin of indebtedness, the intention was that the annual county tax should meet the annual county expenditure. The general assembly, under its constitutional power, (section 7, art. 10,) has vested in the county authorities the power to assess and collect taxes for all county purposes, namely: "For interest and payment on county bonds, such rate as may be necessary

to pay said interest and payments; for ordinary county revenue, including support of the poor, not more than ten mills on the dollar; for the support of schools, not less than two mills, nor more than five mills on the dollar; for road purposes, not more than five mills on the dollar; and a poll-tax not exceeding \$1 for such purposes as may be determined by the county commissioners of each county." Here is a legislative limitation on taxation for county purposes. The maximum rate is fixed. Beyond the limit the county commissioners cannot go. If this limit of taxation is so low as to cripple any county in the management of its county affairs, it is entirely within the discretion of the legislature to raise it. With this power to levy and collect taxes to meet the expenditure of a county during any fiscal year, we do not see how it can be said that a limitation on their power to contract indebtedness can in anywise cripple them in the management of their county affairs. Some counties in the state have admittedly lived within the constitutional limitation. Why have not all? Those which have lived within the limit, to that extent prove its practicability. That it has been impracticable in any county does not affirmatively appear.

2. It is further urged that in the other sections of the article there is no limit fixed to state, city, or town indebtedness, except indebtedness "by loan;" that the different sections are to be construed *in pari materia*. We do not care to construe these sections in any final manner in advance of cases presented under them, and in the absence of full arguments respecting the effect of their provisions. It may be permitted us, however, to say that the correctness of the position taken is open to very grave doubt, if reference be had to other provisions of the constitution. By section 11 of article 10 taxation is limited to a certain rate. By section 16 of the same article expenditure is limited to the taxes raised. Taking the provisions of the two sections together, the intention would seem to be that the annual state tax should meet the annual state expenditure. Construing these two sections in connection with section 3 of article 11, it would appear that no state indebtedness was contemplated except such as might be incurred under the provisions of section 3. The difference lies in this: that a stricter rule is applied to the state than to the county. With regard to city or town indebtedness, it will be observed that section 8 of the article, after providing for indebtedness "by loan," declares that "the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent. of the valuation aforesaid." If this is not a limitation of town and city indebtedness in all forms, it is upon the assumption that the *existing indebtedness* referred to is indebtedness "by loan,"—a position, at best, very doubtful. But if it be true that there is no limitation of the aggregate amount of indebtedness for all purposes that the state may contract, or that a city or town may contract, it would by no means fol-

low that a plain limitation of the aggregate amount of indebtedness which a county could contract is to be disregarded.

3. A contemporaneous interpretation of this section by the first legislature after the adoption of the constitution is claimed. A subsequent practical construction of the section in some counties by the officers having to do with the law is also urged upon our notice. As to the first, we do not find, in the statute referred to, the legislative interpretation contended for. As to the second, the practical construction by county authorities claimed has by no means been universal. We cannot confine construction to cases where the provision has been violated. A large majority of counties, as far as we are advised, have kept within the limit. Upon what grounds are we to say that the construction in such counties has been the same and not the reverse of that claimed? In cases of doubt such interpretation has its place and weight. In the case of *People v. Wright*, 6 Colo. 92, contemporaneous interpretation was allowed weight respecting a point upon which the amendment construed was *silent*. "Where, however, no ambiguity or doubt appears in the law, \* \* \* the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law-makers." Cooley, Const. Lim. 84. "Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." Story, Const. § 407. And here we desire to say that we are unable to see how county authorities, having to deal with this provision, gave it any such construction as is contended for without the gravest doubts as to its validity. We think we keep closer to the fact to suppose that they acted without their attention being called to the provision than to suppose that they misunderstood its plain requirements.

4. It is claimed that the evils to be reached must be considered, and must be taken as guides, to find the legislative intention, and we are asked to take judicial notice of the fact that, prior to the adoption of the constitution, bonded indebtedness in many forms and for many purposes existed as burdens upon cities, towns, and counties of the then territory; that indebtedness in this form was the evil aimed at by this section; that prior to the adoption of the constitution the powers of county commissioners in the matter of incurring indebtedness in the management of county affairs were practically unlimited, save by their "wisdom and discretion;" and in this connection it is confidently asserted "that in 1876, before or at the time of the adoption of the constitution, and for some years thereafter, there was no complaint of burdens imposed by counties or towns for indebtedness contracted other than those imposed by bonds, and for debts contracted and evidenced by such bonds." The conclusion

we are asked to draw from this is that the intention, therefore, could only have been to limit indebtedness "by loan," as it was the only evil complained of.

We are not prepared to say that prior to the adoption of the constitution there had been no extravagance in the management of county affairs, or that there had been no improvidence in the matter of incurring county indebtedness in the nature of a floating debt. On the other hand, we think, if the issue were submitted to a jury, they might, in all probability, find the fact otherwise.

But if we concede the fact as claimed, the conclusion drawn by no means follows. It will not do to say that an actual existing, antecedent mischief is essential to support a constitutional limitation, or an intent to limit, or that the absence of such an actual mischief excludes an intention to limit. On the other hand, it is safe to say that wherever there is a power liable to be abused there is to be found a legislative motive for restraint. The multitudinous restraints of all constitutions proceed largely against possible mischiefs. To leave powers unlimited where there is great temptation to abuse is to invite abuse. The members of the convention were charged with the important duty of framing the fundamental law of the new state. It was a grave responsibility. They were gentlemen of standing, character, and ability, and many of them experienced in the administration of state and county affairs. It was their duty, not only to provide against the recurrence of evils patent and already experienced, but also to guard every point where abuses were liable to creep into the administration of public affairs. The waste, extravagance, frauds, peculations, defalcations, and tax burdens, disgracing and encumbering the administration of American municipalities, county, town, and city, had long been national topics of discussion, written about by publicists, denounced by the press, and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical administration of affairs, whether town, city, county, or state, practically the most important question that came before the convention. To say that the framers of the constitution saw no danger save in "bonded indebtedness" is to credit them with a very limited statesmanship, and to say that they trusted to "wisdom and discretion" as restraints is to impute to them a very sanguine statesmanship. It did not require much wisdom to see that to leave the powers of the county commissioners to contract indebtedness unrestrained, save by the old rule of "wisdom and discretion," was, at best, to leave security in this behalf a matter of chance, dependent on the vicissitudes of nominating conventions and partisan elections. Nor are we to suppose that they dealt with the important question of public indebtedness other than in a practical manner; that they made an unsubstantial distinction, and limited the *form*, and not the *amount*, of indebtedness. The indebtedness was the essential thing. The mischief would be the

same, and the burden the same, whether the debt was "by loan" evidenced by bonds or a floating debt evidenced by warrants. If forbidden one guise, it was easy for extravagance to assume the other, and county indebtedness would remain practically unrestricted. All this is upon a concession of the assertion that no abuse existed in the administration of county affairs in the then territory except in the matter of bonded debt. We have endeavored to make it plain that, admitting the fact, no trustworthy or exclusive presumption such as is contended for arises respecting the intention of the framers of the constitution,—certainly none that would authorize us to interpolate into the section a word which changes its meaning radically and from a meaning not "absurd and monstrous," but entirely admissible and in accord with the provisions of the constitutions of other states.

We have thus noticed the principal considerations which have been urged that the real and only intent of the framers of the constitution was to limit indebtedness "by loan," and that "section 6 must be interpreted as though the word 'such' had been inserted between the words 'all' and 'purposes' in the tenth line of the section." We might, perhaps, have rightfully dismissed these objections by the application of the rule that "we are not to import difficulties into a constitution by the consideration of extrinsic facts when none appear upon its face." We have, however, preferred to enter into their consideration, believing that an appeal to extrinsic facts would support the justice and correctness of the construction given. And this brings us to a consideration of the proceedings of the constitutional convention, recorded in their journal, and on deposit in the archives of the department of state by order of the convention. Of these proceedings we take judicial notice. Cooley, Const. Lim. 80. We have examined this journal, and have traced this article and section with great care from the time it was first reported by the committee on state, county, and municipal indebtedness, on January 25th, until its final passage. It was considered in the committee of the whole many times, and many times recommitted. It is necessary to notice the many changes which the section underwent. It will be found that under date of February 10th the word "such" was, on motion, inserted before the word "indebtedness" in the ninth line of the section, (tenth line as published;) that subsequently, and on the same day, the vote by which this amendment was made was reconsidered, and the word "such" omitted from the section as adopted by the convention on that day; that the article was then referred to the committee on revisions and adjustments; that subsequently, and on the second day of March, the above committee reported the section back to the convention with the word "such" again inserted before the word "indebtedness" in the ninth line; that the convention approved the section in this form; that the article was then recommitted to the committee on revisions for adjustment in the constitution; that subsequently, and on the eighth day of March, the convention in-

structed the committee on revisions and adjustments, by resolution, to strike out the word "such" in the ninth line of section 6 of the article on state, county, and municipal indebtedness; and that this was the last and final amendment to section 6 prior to its adoption by the convention in its present form. These several entries show that the attention of the convention was called to and occupied with the very limitation contended for by the relator; that they twice limited the section to indebtedness "by loan" by the insertion of the word "such," and twice, and finally, changed it back to a general limitation, applying to the aggregate amount of county indebtedness, for all purposes and in all forms.

We are not to presume that the framers of the constitution did not understand the force of language. This *action* of the convention shows conclusively an *intention*,—shows conclusively that they intended that the section should stand, and be read, understood, and adopted by the people, as expressing a meaning different from the meaning which the word "such," inserted as indicated, would give to the section. Thus we see that this word which we are asked to interpolate into the section "is a stone which the builders rejected." We are not at liberty to restore it to, and make it the "head-stone" of, the section. While the ultimate inquiry is always the intent of the people who adopted the constitution, the intention of its framers is an associated inquiry. The people are supposed to have accepted and ratified the instrument in that sense most obvious to the common understanding. Cooley, Const. Lim. 80.

The limitation being applicable to all debts, irrespective of their form, it follows that, in determining the amount of county indebtedness at any time, county warrants are to be taken into the account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void. Whether the doctrine recognizing the right to anticipate, by assignment, revenue, levied but uncollected, by warrants drawn thereon and accepted absolutely in payment, is admissible under our statutes, we do not now determine. The case, as it stands, does not present this question. *Law v. People*, 87 Ill. 385.

The hardships and inconveniences resulting from this construction are urged upon our attention. To such appeals the language of the courts is uniform. The province of the judiciary is not to make the law, but to construe it. The meaning of a constitutional provision being plain, it must stand, be recognized, and obeyed as the supreme law of the land. "It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the court may take that office upon themselves, or, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be worse than useless."

Nor is there any just force or propriety in the argument of repudiation. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them; \* \* \* and all persons dealing with them must see that the body has power to perform the proposed act. *Law v. People*, 87 Ill. 394; *Litchfield v. Ballou*, 114 U. S. 190; S. C. 5 Sup. Ct. Rep. 820; *Dixon Co. v. Field*, 111 U. S. 83; S. C. 4 Sup. Ct. Rep. 315. County authorities, as well as all parties dealing with them, must take notice of the limit which the people in their constitution have prescribed for county indebtedness. No plea of ignorance or hardship can be allowed to avail. To afford security the rule must be inexorable. If the argument of repudiation is to prevail, then every constitutional limitation against incurring indebtedness, whether state, county, or city, "is a sounding brass and a tinkling cymbal." Its violation in every instance would supply the reason for not enforcing it, because to enforce it would deprive parties of benefits arising from its violation, and this would be repudiation.

The defense interposed by the answer is good. The demurrer is overruled.

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(9 Colo. 112)

### BOSTON & COLORADO SMELTING CO. v. PLESS.

Filed March 26, 1886.

#### 1. ATTORNEY AND COUNSEL—ATTORNEY'S LIEN—STATUTORY LIEN ON JUDGMENT—JUDGMENT DEBTOR—NOTICE.

The judgment debtor is a stranger to the contract for fees between the judgment creditor and his attorney; hence the former is entitled to notice before being charged with liability in the premises, or knowledge of such attorney's intention to enforce his lien under the statute for fees.

#### 2. SAME — NOTICE — FILING ASSIGNMENT IN COURT AS NOTICE TO JUDGMENT DEBTOR.

An attorney to whom an assignment of part of the judgment has been made cannot, by placing it on file in the district court, and a written reference thereto in the supreme court, be regarded as having given notice of his rights through the assignment to the judgment debtor.

**Appeal from district court, Park county. On motion to dismiss cause.**

The attorney who tried this cause in the court below, and obtained the judgment for Pless, took a written assignment of one-half thereof as security for his fees. Upon the appeal this attorney employed Stuart Bros., and reassigned to them one-fourth of the judgment to secure their fees. Stuart Bros. rendered valuable services, and incurred some expense, in connection with the appellate proceedings. Judgment of affirmance was rendered in the supreme court, but a rehearing afterwards allowed. Subsequent to the affirmance as aforesaid, Stuart Bros. placed upon the files of that court a notice informing appellant that they held an assignment of one-fourth of the judgment, the original assignment or a copy thereof having been previously filed in the court below. Thereafter, pending argument on

the rehearing, appellant and appellee, without the knowledge or consent of Stuart Bros., made a settlement of the controversy, the latter receipting payment in full of the judgment. The written release by appellee contains a stipulation that the *cause* may be dismissed. The motion to dismiss is now resisted by Stuart Bros. upon grounds stated in the opinion.

*Wilkin & Bailey, R. D. Thompson, and E. O. Wolcott*, for appellant, Boston & Colorado Smelting Co.

*Geo. R. Gwynn, Stuart Bros., and A. W. Stone*, for appellee, Joseph S. Pless.

PER CURIAM. The motion to dismiss must be allowed. We are not advised by the record that the company (the judgment debtor) had notice or knowledge of the assignment to Stuart Bros. till after the settlement was made. Placing the assignment upon the files of the district court, and a written reference thereto on the files in this court, could not be regarded, under our laws, as notice to the company of the attorney's rights through the assignment. There is nothing before us to show that either of these papers was ever seen by any officer or agent of the company, or the existence thereof mentioned to any such officer or agent, until after the settlement had been fully consummated. Therefore, as *assignees* Stuart Bros. are not in position to resist the motion under consideration. *Freem. Judgm. § 426*, and cases; *Wade, Notice, § 431*. "After notice to the judgment debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties." *Stoddard v. Benton*, 6 Colo. 508. Nor are Stuart Bros. aided by a reliance upon section 85 of the General Statutes, giving attorneys a lien for fees upon judgments obtained by them. While this lien attaches to the judgment at once upon its recovery, as between attorney and client, so that nothing more is necessary prior to the enforcement thereof against the latter by proper action, we are inclined to the opinion that, to hold the judgment debtor for the creditor's attorney's fee, the former must be notified of the attorney's intention to take advantage of the statute. If, without knowledge of this intention, either through a formal notice, or through credible information derived in some other way, the debtor make a *bona fide* settlement of the judgment with the creditor, by payment or otherwise, the attorney cannot look to the former for his unpaid fee.

The statutory lien is a security of the benefit of which the attorney may or may not avail himself. He is, of course, not entitled to it unless there remain due to him unpaid fees. The judgment debtor is a stranger to the contract for fees between the judgment creditor and his attorney; hence, in our opinion, the former is entitled to notice before being charged with liability in the premises. He is not bound to presume, in the absence of information on the subject, that the attorney's fee of the latter has not been paid; nor is he, by vir-

tue of the statute, required to take notice that the attorney will elect to claim the benefit of the lien thereby provided for. It is more reasonable to suppose that the legislature intended to leave in force the common-law rule requiring notice in such cases. Stating this common-law rule, see Whart. Ag. §§ 628, 629; Weeks, Attys. §§ 379, 384.

We are aware that there is at least one state wherein, under a statute somewhat similar to our section 85, it is held that the judgment debtor is charged *without notice*; but we do not feel satisfied with the reasons stated in support of this view, and have therefore declined to follow the opinions announcing it. The position taken in some decisions that where a judgment is for costs only the record is itself notice to all parties of the attorney's lien thereon for his costs need not be here considered, because, in the first place, we are dealing with a statute which does not refer to costs, and, secondly, such was not the judgment in the case at bar. There is no pretense that actual notice of the reliance by Stuart Bros. upon the statute was given the company until after the settlement; and simply placing the papers above mentioned upon the files was not constructive notice to the company of their intention in the premises.

The motion is allowed.

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(9 Colo. 115)

**METZLER and others v. JAMES.**

Filed March 26, 1886.

**APPEAL—INFORMALITIES—ALLOWANCE—COSTS.**

Allowance of an appeal to stand, notwithstanding irregularities in form not affecting the merits, upon appellant's paying costs of appellee caused by the informalities.

Appeal from superior court, city of Denver.

*Decker & Yonley*, for appellants, Hannah Metzler and others.

*Long & Hinsdale*, for appellee, Philip W. James.

**PER CURIAM.** A decree in an equitable proceeding was rendered by the superior court of the city of Denver on the twelfth day of May, 1885, in favor of the plaintiff, James, and against the defendant Metzler. An appeal from said decree to this court was prayed by said Metzler, and allowed by the court, upon condition of the filing and approval of an appeal-bond, which was duly filed and approved. Several attempts have been made by the appellant to transfer the appellate proceedings to this court, but, thus far, the steps taken have been defective. As a result of the several errors committed on the part of the appellant (most of them, we regret to say, through carelessness) there are now six motions pending for decision in the proceeding. We find, however, that a decision of the questions arising in two of the pending motions will dispose of all the rest.

A motion is made for leave to file a bill of exceptions. While the

document presented is not properly a bill of exceptions, yet we are of opinion that to a certain degree it supplies the place of a bill of exceptions, and is entitled to be filed in the case. It contains the report of the referee, and includes the testimony, exceptions to the rulings of the referee, certain original papers, and a transcript of proceedings had in the court below. Being in the nature of a chancery proceeding, it was proper for the clerk of the superior court to certify up to this court, under *section 22* of the present appeal statute, the written testimony, the depositions, and all other evidence, and papers used or offered as evidence. The original pleadings come up in the same way, and all other papers affecting the substantial rights of the parties which were used or offered at any step in the cause, save in perfecting the appeal. Record entries come up by transcript. The cause having been referred to a referee to take the testimony, to state the account, and to report his findings of law and fact, it will be seen that his report would necessarily comprise the principal matters embodied in a bill of exceptions. This motion is allowed.

The other motion referred to is a motion for leave to file a supplemental transcript of the record, embracing the order of the court below granting the appeal, together with a transcript of the appeal-bond. We have decided to allow this motion, also, and to permit a proper transcript of said order and appeal-bond to be filed. We cannot, however, permit the document tendered for filing under this motion to be placed on file, for the reason that it does not comply with the law. It properly contains a certified transcript of the order granting the appeal, but instead of a transcript of the appeal-bond, the original bond itself is transmitted. This instrument belongs to the files of the court below, and there is no authority, either in the present statute or in the former act, for removing it from the files of said court. The appeal in this case was granted under the former law, but the appellant is endeavoring to transfer the cause to this court under the present law, which he has a right to do. There is but one mode provided under the present act for transferring a cause on appeal to this court, although, as to certain portions of the record, whether they shall be brought up in the original form or by abstract depends upon the character of the action; but whether the cause be in the nature of an action at common law, or an action in chancery, in order to transfer the cause to the docket of this court the clerk of the court below must transmit to the clerk of this court, as required by *section 9* of the act, a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice of appeal; likewise a transcript of the notice of appeal, together with the proof of service thereof, and a transcript of the appeal-bond.

Several reasons may be assigned for retaining an appeal-bond on file in the trial court, two of which may be mentioned: the danger of loss if taken from the files of the trial court; and the fact that if

transmitted to and filed in an appellate court it would belong to the files of said court, whereas, if occasion to sue upon it occurred, it would be needed in the court below. This provision of the statute not having been complied with, the appellant will be allowed 24 hours in which to procure a proper supplemental transcript of the record, which thereupon may be filed.

Both of the foregoing motions were filed by the appellant for the purpose of curing errors committed in attempting to institute appellate proceedings in this court. These errors on the part of the appellant have occasioned needless expense, as well as unnecessary delay. As above intimated, we are of opinion that they might have been avoided by the exercise of reasonable care and attention. Considering it to be our duty, under the circumstances, to impose terms as a condition upon which the foregoing motions are granted, it is therefore ordered that the appellant, within 10 days, pay to the clerk of this court, for the use of the appellee, in payment of costs and expenses incurred by him in and about this appeal, and as the condition upon which said motions are granted, the sum of \$75.

Justice ELBERT did not sit in this case.

SUPREME COURT OF COLORADO.

(9 Colo. 133)

DANIELS v. DANIELS.

Filed April 9, 1886.

1. APPEAL—NOTICE—SERVICE.

A notice of appeal which is required to be filed, and then served on adverse party, cannot be served on the party and then filed.

2. EXCEPTIONS—BILL OF EXCEPTIONS.

A bill of exceptions signed by the judge is conclusive of matters therein recited.

3. HUSBAND AND WIFE—DIVORCE—ALIMONY.

A decree allowing alimony and counsel fees is, to all legal intents and purposes, a final judgment, from which an appeal may be taken.<sup>1</sup>

4. SAME—ALIMONY, WHEN GRANTED.

Although the statute makes no provision for alimony except as an incident to proceedings for divorce, this does not preclude the courts from granting temporary or permanent alimony in a proper case, although a decree for divorce is not included in the relief prayed for.

5. SAME—MAINTENANCE.

To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and be supported by verification and affidavits; but the merits of the original or main controversy cannot be inquired into on such a petition.

6. SAME—SEPARATION.

A contract of separation of man and wife must be untainted by fraud, and the contract must be fair and reasonable, considering the circumstances of the parties.

7. SAME—SEPARATION—FRAUD—JURISDICTION.

A complaint stating that articles of separation were executed against the free will and consent of the wife, and under circumstances which, if established, would render the articles void, is sufficient to authorize a court of equity to assume jurisdiction to investigate the matters alleged in the complaint.

Appeal from district court, Arapahoe county.

*Patterson & Thomas* and *Benedict & Phelps*, for appellant, William B. Daniels.

*Rucker & Ewing* and *Teller & Orahood*, for appellee, Lilyon B. Daniels.

BECK, C. J. The purpose of the action instituted in the district court by the plaintiff, Lilyon B. Daniels, against her husband, William B. Daniels, and now pending therein, as shown by the prayer of the complaint, is to obtain a decree annulling the articles of separation entered into by the parties upon the sixteenth day of January, 1883, and to compel the defendant to pay the plaintiff the sum of \$25,000 annually as permanent alimony. A separate petition was filed in said cause praying for alimony *pendente lite*, to which an an-

<sup>1</sup> An order in an action for a divorce awarding the wife alimony and suit money *pendente lite*, to be paid by the husband, cannot be taken by appeal or error to the supreme court before judgment or decree granting or denying the divorce. *Aspinwall v. Aspinwall*, (Neb.) 25 N. W. Rep. 623.

swer was filed by the defendant, and the issues therein formed submitted to the court. The court thereupon ordered and adjudged that the defendant pay into court, for the use of the plaintiff, the sum of \$1,000,—\$700 thereof being for the use of her counsel as their solicitors' fees, \$300 thereof for her use in procuring testimony, witnesses, and other expenses incidental to the prosecution of her suit,—and the further sum of \$75 a month as alimony *pendente lite* until the further order of the court. From this decree the defendant appealed to this court. The defendant also demurred to the original complaint, which demurrer the court overruled, and thereupon defendant appealed from the order overruling the demurrer. Both of these appeals are now submitted for the consideration and judgment of this court.

The first question to be considered is the regularity of these appeals. The appeals are taken under the act of the legislature approved April 23, 1885, (Laws 1885, p. 350,) and it is alleged by counsel for appellee that in the taking of said appeals the statute was not complied with on the part of the appellant; consequently that neither of said appeals can be entertained by this court.

The decree for alimony *pendente lite* was made October 12, 1885. The objection to the regularity of this appeal is that no copy of the notice of appeal was served on the plaintiff or her attorneys; and the objection to the appeal from the order overruling the demurrer to the original complaint is that the notice of appeal was served on the plaintiff's attorneys nine days before the original notice was filed in the clerk's office of the court below.

Section 8 of the act referred to provides as follows:

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice of appeal on the adverse party or his attorney."

In so far as the objection relates to the appeal from the order overruling the demurrer it appears to be well taken. The statutory provision above quoted does not differ materially as to the mode of taking an appeal from the provision appearing in section 339 of the Code of 1877, except that the latter section requires, in addition to the filing of notice and service of the same on the adverse party or his attorney, the execution of a bond. In the case of *Alvord v. McGauhy*, 4 Colo. 97, the notice of appeal was not filed in the office of the clerk until two days after a copy of said notice was served upon the attorney of the appellee. In that case the court say: "In taking an appeal the first essential act, without which it will have no validity, is the filing of the notice thereof. Unless the filing of the notice either precedes or is contemporaneous with the service thereof, it will be ineffectual." In *Bacon v. Lamb*, Id. 474, it was held if the service of the notice and the filing thereof in the clerk's office were on the same day, the acts will be presumed to have been contemporaneous. In California, under a similar statutory provision, it was held that "the filing

of the notice of appeal is made a constituent element of its character as a notice, and, consequently, must precede or be contemporaneous with the service of a copy of the notice on the adverse party; otherwise that which may purport to be a copy of a notice or duplicate thereof fails to be such for the want of an original." *Buffendeau v. Edmondson*, 24 Cal. 94. These authorities, and the phraseology of the statute itself, are decisive of the objection raised to the regularity of the appeal from the order overruling the demurrer. The statute not having been substantially complied with, the appeal from that order cannot be considered.

In respect to the order or decree for alimony *pendente lite* and suit money, the objections urged as to the irregularity of the appeal from this order do not exist. The original transcript filed in this court shows that this order was made October 12, 1885, and that notice of appeal therefrom was filed in the clerk's office, and a copy thereof served on the attorneys of the appellee, upon the same day,—October 12th. The omissions relied upon appear in the abstract only,—not in the transcript. Another objection urged to the validity of this appeal is that no exception to the ruling of the court granting alimony *pendente lite* was reserved by the appellant. This is also a mistake, as is fully shown by the bill of exceptions, signed by the judge, and made a part of the record in the cause, wherein occurs the following: "To which ruling and decision of the court in allowing, decreeing, ordering, and adjudging said support, maintenance, counsel fees," etc., "aforesaid, the defendant, by his counsel, then and there excepted."

But it is contended upon other grounds that no appeal lies from this order or decree: (1) Because it was made in an equitable action, and was "a discretionary order;" (2) because an appeal does not lie from such order under the statute of 1885.

The proposition that the order was discretionary, and for that reason not appealable, assumes one of the main points in controversy, namely, that the court had jurisdiction to make the order. If it be true that orders of this nature are within the discretion of the court in divorce cases, it determines nothing in a case like this, where a divorce is no part of the relief sought, and the jurisdiction of the court is challenged on that ground. Whether or not such an order, even in divorce cases, is purely discretionary and not reviewable admits of grave doubts, under recent decisions.

The cases cited by appellee in support of the proposition that no appeal lies in this case throw but little light upon that question. They are principally cases relating to interlocutory judgments for costs; as in the case of *Briggs v. Vandenburg*, 22 N. Y. 467, wherein it was held that under the provisions of the Code, in an action prosecuted or defended by a receiver, costs may be recovered as in an action against a person prosecuting or defending in his own right; and that the "court may, in its discretion, in cases mentioned in the

section, require the plaintiff to give security for costs;" and that no appeal lies from such order. So, also, in *Briggs v. Bergen*, 23 N. Y. 162, it was held that no appeal lies from the supreme court from an order striking out a sham answer under the section providing that "sham and irrelevant answers may be stricken out on motion, and upon such terms as the courts in their discretion impose." In *Walker v. Spencer*, 86 N. Y. 162, an appeal appears to have been taken from certain portions of an interlocutory judgment allowing costs and expenses to one of the parties on the overruling of a demurrer. In this case the appeal was dismissed on the ground that while an appeal lies in such cases to the supreme court, it does not lie to the court of appeals. *Smith v. Rathbun*, 88 N. Y. 660, was also a case of an interlocutory order entered upon overruling a demurrer to the complaint, from which an appeal was taken. The appeal in this case seems to relate to the form of the order, and the court say: "This is, therefore, a mere controversy as to the form in which the supreme court shall express its decision; that is a controversy to be settled by that court, and not appealable to this court." *Marble v. Bonhotel*, 35 Ill. 240, holds that the granting of a temporary injunction is a matter of sound discretion, and cannot be reviewed upon appeal. In *Richards v. Burden*, 31 Iowa, 305, it was held that an appeal to the supreme court did not lie from the ruling of the court below upon the admission or exclusion of evidence, but that the question may be presented on an appeal upon the final disposition of the cause. In *Forrest v. Forrest*, 25 N. Y. 518, the appeal was from part of a judgment for divorce fixing the plaintiff's alimony; and while it was held that the authority of the court was discretionary as to the amount of the alimony, and from what date it should commence, yet the appeal appears to have been entertained for the purpose of ascertaining whether the power had been arbitrarily exercised. The court say: "There is no other rule or criterion to guide than the *boni viri arbitrium*; and as it is a judicial, and not an arbitrary, discretion to be exercised, we do not say there may not be an appeal from such an order." Upon the question of our jurisdiction to entertain this appeal the authorities cited in support of the views of appellee's counsel are not sufficiently analogous to the proceedings before us to warrant its summary dismissal.

We will now consider the following questions: (1) Is the order allowing temporary alimony and counsel fees such an order or decree as may be appealed from under section 1, Code Amend. 1885? (2) If appealable, did the court below have jurisdiction to enter the judgment or decree appealed from? (3) Did the court err in allowing said temporary alimony and suit money, and in entering judgment therefor?

*First.* Is the order appealable? There are two sections of the act of 1885 conferring appellate jurisdiction on this court. The first section is as follows:

"The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character, except in actions for damages commenced before a justice of the peace in which the judgment was for a less sum than fifty dollars." Laws 1885, p. 350.

The provisions of this section are broad enough to cover every judgment or decision which is in the nature of a final judgment, and which possesses the elements of a final judgment. When such a judgment is entered nothing remains to be done but to enforce it, and it may be enforced in the same manner and by the same means usually employed to coerce the payment of money judgments and decrees. The judgment or decree appealed from was rendered in an original proceeding, and it was based upon that proceeding; but it was rendered upon separate pleadings, wherein distinct and different relief was sought from that for which the original suit was instituted. The object of the original complaint was to obtain a degree annulling articles of separation, and for the allowance of permanent alimony; the purpose of the intermediary proceeding was to require the respondent to furnish to the plaintiff means for temporary subsistence, for counsel fees, and for suit money. The latter is clearly a separate and independent relief, and requires the entry of a separate judgment. A similar question arose in the noted case of *Sharon v. Sharon*, 7 Pac. Rep. 456, and was fully considered by the supreme court of California, in which similar Code provisions were construed. The court arrived at the conclusion that a judgment for alimony *pendente lite* was a final judgment or decree, and cited authorities fully sustaining that conclusion. The court say: "A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from the final judgment, in an action." They say if it is in the nature of a final judgment, and is final upon the question adjudicated in it, the same is appealable. This doctrine is sustained by the supreme court of Kentucky in *Lochnane v. Lochnane*, 78 Ky. 468, and *Hecht v. Hecht*, 28 Ark. 92. These were cases of appeal from orders allowing alimony and counsel fees pending proceedings in divorce. The appeals were sustained in both cases upon the grounds above stated. In *Hecht v. Hecht*, *supra*, the court held that the judgment was not, strictly speaking, an interlocutory one, but a definite judgment, upon which payment might be enforced before final judgment entered in the original cause; that execution might issue thereon, and the money be collected and paid over to the parties before the entry of final judgment in the cause; and even though it should appear that injustice had been done, no relief could be afforded by the final decree. In *Blake v. Blake*, 80 Ill. 523, an appeal was taken from a decree of the circuit court of Cook county "awarding attorney's fees and other expenses in a divorce cause" pending the proceeding for divorce. The court held that

it was a money decree, for a specific sum, payable absolutely, which the court had undoubted authority to enforce by the award of execution by sequestration of real or personal estate, or by attachment, if payment was willfully and contumaciously refused. As to the nature of such decree the court say:

"Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive."

It is further held not to be an answer to the foregoing position that the decree may be reviewed on appeal or error after the final decree in the original cause, since the litigation might be protracted for years, and the defendant in the mean time imprisoned for disobedience to the decree, or subjected to the payment of the sum decreed. It is conceded that alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, and that the result of the appeal would operate to delay the litigation until the propriety of the decree for temporary alimony and solicitor's fees could be determined in the appellate court; but these considerations are held not sufficient to work a denial of the right of appeal in such case. With respect to the discretionary powers of the court below in such case it was held that while the trial court, under the statute of that state, has power to award attorney's fees and other expenses in divorce cases, and that the matter is largely discretionary with the court, the supreme court has always assumed jurisdiction to review the action of the court below in regard to allowances for alimony or solicitor's fees; citing *Blake v. Blake*, 70 Ill. 618,—a doctrine which we heartily approve. It is further said in *Foss v. Foss*, 100 Ill. 576, that the allowance of alimony *pendente lite* is discretionary; but it is a judicial, and not an arbitrary, discretion which is to be exercised, and that a judgment therefor is subject to an appeal. To the same effect is *Stillman v. Stillman*, 99 Ill. 196. See, also, *Harrell v. Harrell*, 39 Ind. 185. In *Schonwald v. Schonwald*, Phill. Eq. 215, the court, referring to the judge of the court below, say:

"His honor was of the opinion that the allowance of alimony *pendente lite* was a matter confided to his discretion. In this he was mistaken. Whether the matter set forth is sufficient to entitle the petitioner to a decree for alimony, assuming it to be true, is a question of law; and the discretion confided to the court below is in regard to what is a reasonable amount."

In the case of *Williams v. Williams*, 29 Wis. 517-524, it was held the power of a court in a divorce proceeding to make allowance to the wife for her support and that of her children during the litigation, and for expenses in prosecuting or defending an action, is discretionary with the trial court, but such discretion is to be exercised with reference to all the circumstances of the case which will affect the amount of such allowance, and with due regard to certain rules

which are almost universally recognized and applied by the courts in such cases. Such orders are appealable to the supreme court, but they will not be interfered with unless it is apparent that some of the conditions which should have been considered by the court below have been overlooked or disregarded to the manifest injury of either the husband or wife. Appeals from such orders allowing alimony are entertained by the supreme court of the state of Iowa, (see *Farber v. Farber*, 64 Iowa, 362; S. C. 20 N. W. Rep. 472; *Wilson v. Wilson*, 49 Iowa, 545,) and in several other states appeals are given by statute.

We think the authorities cited lay down the correct doctrine, and consequently hold that the decree or order under consideration is, to all legal intents and purposes, a final judgment, from which an appeal may be prosecuted to this court. This conclusion disposes of the motion to dismiss the appeal, which motion, by stipulation of counsel, was included in the submission of the cause.

*Second.* Did the court below have jurisdiction, in a cause like this, to enter the judgment or decree for temporary alimony? It must be conceded that the authorities are conflicting upon this subject; and since the questions of law to be considered have never been decided by this court, we shall feel ourselves at liberty to determine them in such manner as we shall deem most in accordance with the principles of equity, and most conducive to proper practical results, being restrained only by the general rules and principles of law, and by the rules of construction recognized by the decisions of this court.

We will first inquire whether the district court had jurisdiction of the original cause of action. This is a pertinent inquiry, for unless such jurisdiction existed as to the original subject-matter of the action, we would conclude at once that the court had no jurisdiction of the subject of temporary alimony. The failure of the appeal from the order overruling the demurrer to the complaint does not preclude this inquiry, since the question of jurisdiction over the subject-matter of an action may be raised at any time under our practice. The original complaint sets out the articles of separation, and, in substance, alleges that the plaintiff was compelled to execute the same against her will, and under false promises of the husband that they were rendered necessary for a temporary purpose only, and that she would, in a few months, be restored to her marital relations and rights. She incorporates in her complaint copies of letters written to her by the defendant while in the city of New York as evidence of said facts. She states a series of acts of mistreatment which she received at the hands of the defendant previous to the signing of said articles, and alleges that in consequence thereof she was prostrated with serious illness, and was thereby rendered mentally incapacitated to transact the ordinary business of daily life; and that defendant, through his friends and advisers, seized upon this occasion to obtain her consent to a separation. She mentions, among other inducements held out to

her by the defendant and his friends and advisers to procure her consent thereto, one to the effect that he was going to leave America for several years, and that she would be left during his absence in her then penniless and neglected condition previously averred in the complaint. She charges that she was induced to believe that the separation contemplated was only to be for a few months, when she would be restored to her former marital relations; charges that she had been kept ignorant, and was then ignorant, of the value of the defendant's estate, and induced by the representations of the defendant to believe that \$75,000 was as much as half of the value of his estate, whereas it was at that time of the value of \$1,000,000, and is now of the value of \$1,300,000; and that his annual income has been for several years last past, and is now, of the amount of \$150,000.

The articles of separation show that the value of the property conveyed to her was estimated at the value of \$60,000, and that she received \$15,000 in money. She alleges that a portion of the property embraced in the articles of separation did not belong to the defendant in his own right, but, by virtue of a will of his former wife, belonged to his son, and that the defendant was unable, therefore, to give a clear and perfect title thereto to the plaintiff, and that a cloud now rests upon the said parcel of property. She alleges that the property mentioned in the articles of separation was only worth the sum of \$35,000 at the time she received conveyances therefor; and, in this connection, says that by reason of her illness she was unable to ascertain the truth of these matters, and was induced to sign the contract in ignorance of the same, and that she relied upon the representations of the defendant concerning the title to the same, and upon his representation that the separation was only to be a temporary one. Another allegation is that through and by defendant's advice said property has been so mismanaged that it is now not worth more than the sum of \$7,000; that at the present time all of her real estate is incumbered,—a large part of it for more than it is worth, and all of it is incumbered for as much as can be borrowed thereon. In respect to the money received from the defendant on the execution of the articles of separation plaintiff says it was all consumed in the support of herself and widowed mother, and in defraying other necessary expenses, and that she is now without any money whatever for her own maintenance, or to enable her to prosecute this action. She further charges that the contract of separation is void, for the reasons that there never existed any sufficient reason in law to support the same; that the marriage relation between plaintiff and defendant was at all times founded on love and respect; and that defendant's conduct in respect to the separation was the result of undue influence on the part of defendant's friends and advisers; and, as before stated, that fraud and deception were used by defendant in procuring plaintiff's signature thereto.

The prayer of the complaint is that the articles of separation

be-declared null and void; that the defendant be decreed to pay plaintiff a reasonable sum for support and maintenance during the pendency of this action, and such sums as may be necessary to enable her to prosecute this action, pay solicitor's fees, and defray necessary costs and expenses; also that plaintiff be made to pay plaintiff \$25,000 yearly for her support and maintenance.

The defendant in his answer denies each and all of the fraudulent acts and conduct charged in the complaint, and alleges that during the brief time of his cohabitation with the plaintiff as his wife she was repeatedly guilty of such gross misconduct and ill treatment of him as to render his life burdensome and intolerable. He alleges that the separation was caused alone by the ill treatment and abuse received by him at the hands of the plaintiff. It is unnecessary here to specify the several denials set up in the answer, since all material allegations of the complaint charging fraud, mistreatment of the plaintiff, misrepresentation of facts to induce her to enter into the contract of separation, concealment of the value of his estate, pretenses that he was about to leave the country for years, whereby she would be left in a penniless and destitute condition, pretenses that the separation was to be merely temporary,—a few months only,—and other fraudulent concealments, misrepresentations, and devices, alleged to have been used to induce her to agree to the separation, are positively denied. He alleges that the property conveyed to her was reasonably worth the sum fixed and stated in the articles of separation, and that none of it at that time was incumbered, or under any cloud whatever; denies that the plaintiff was at the time prostrated by illness, or mentally incapacitated to do business, and alleges that she was fully informed of the value of the property conveyed to her; that she took time for the consideration of all matters connected with the separation, and was assisted therein by competent and able legal counsel. He positively denies that by his advice the real estate became incumbered or mismanaged, or that the articles of separation have in any way been rendered null and void by subsequent promises or acts of the defendant; and alleges that the fortune settled upon the plaintiff at the time of the separation was amply sufficient to support her in a handsome manner during her entire life.

We have thus given the substance of the defense, as well as the charges contained in the complaint. As will subsequently appear, however, but few of the averments of the defense can be considered upon the questions involved in this appeal.

When a question of jurisdiction is submitted to us, it is not our province to prejudice a cause of action by inquiring into and passing upon the merits of the original controversy. The general rule for ascertaining whether a court has jurisdiction of a certain subject-matter is by inspection of the original complaint. If the original complaint states upon its face a case for relief coming within the equitable jurisdiction of a *nisi prius* court, this is the limit of our in-

quity, especially in a case like the present, where issues of fact are joined upon the pleadings filed in the original action, and the appeal pending in this court is taken from an intermediary decretal order made in the case. It would be highly improper for us to investigate and prejudge the merits of such original controversy upon the allegations, charges, and counter-charges contained in the several pleadings filed in the main case.

It is contended by defendant's counsel that no relief can properly be granted under said complaint, since the allegations thereof disclose facts which operate to defeat the jurisdiction of the court to entertain the cause. The principal ground of relief prayed for is that the defendant be decreed to pay the plaintiff an annual sum of money for maintenance and support. Another and preliminary ground of relief asked for is the annulling of the articles of separation. It is contended by counsel for defendant that the plaintiff's complaint is not sufficient in law to confer jurisdiction upon the district court, and for that reason that an order for alimony *pendente lite* cannot be sustained.

The grounds assigned for failure of jurisdiction are (1) that a suit for alimony alone cannot be maintained in this state, since the statute only authorizes alimony as an incident to proceedings for divorce; (2) that the articles of separation interpose an insurmountable obstacle to the jurisdiction of the court to award permanent alimony, for the reason that the same are *prima facie* good and binding until set aside by the decree of a court of competent jurisdiction.

Another objection assigned to the jurisdiction of the court is that alimony can only be granted under our statute as incident to a proceeding for divorce, and that no divorce is prayed for in this case. It is true that the statute of this state makes no provision for alimony except as an incident to proceedings for divorce; but this statute does not, we apprehend, preclude our courts from granting alimony, either temporary or permanent, in a proper case, although a decree for divorce may not be included in the relief prayed for. As said in *Galland v. Galland*, 38 Cal. 265, the legislature was not dealing with the general subject of alimony, as an independent subject-matter of legislation, but only as one of the incidents of an application for divorce. The same court holds that the subject of alimony comes within the general powers of a court of equity, independently of the statute. This view of the jurisdiction of courts of equity to grant alimony in the nature of maintenance to a wife, unconnected with proceedings for divorce, was taken by the supreme court of Alabama in the recent case of *Hinds v. Hinds*, 22 Cent. Law J. 308, which affirms the doctrine laid down in *Glover v. Glover*, 16 Ala. 440. The conclusion there announced was that courts of equity exercised a jurisdiction over the subject of alimony, not merely incidental, but original, in cases where the wife's right to a maintenance existed. The same doctrine is maintained in *Purcell v. Purcell*, 4 Hen. & M.

507. In the case of *Glover v. Glover*, *supra*, the court say: "The broad ground upon which the jurisdiction is made to rest is the unquestioned duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty." The same doctrine exists in Mississippi, as appears by the late case of *Verner v. Verner*, 62 Miss. 263. CAMPBELL, C. J., in delivering the opinion of the court, says: "It is settled in this state that a wife denied support by her husband may bring her bill for alimony without seeking a divorce."

The second ground of objection is that the articles of separation are *prima facie* valid until set aside by decree of a court of competent jurisdiction. Conceding this proposition to be true, it does not necessarily divest the court of jurisdiction to inquire whether the articles of separation were fairly entered into, and without any imposition being practiced upon the wife. The allegations of the complaint raise the question of fact whether the articles of separation are valid or not. The law concerning the contract of separation, and the execution of articles to effect the same, is strict, and requires the utmost good faith on the part of the husband.

The law upon this subject seems to be pretty well settled, and is to the effect that the transaction must be untainted by fraud, and the contract must be, in all respects, fair, reasonable, and just, taking into consideration the circumstances of the parties. The wife must be in a position to act with perfect freedom, and with full knowledge of all the circumstances and conditions which enter into the transaction, and with full knowledge of her rights, and that the contract makes sufficient provision for the maintenance of the wife according to the *status* of the parties. *Switzer v. Switzer*, 26 Grat. 574; *Miller's Ex'r v. Miller*, 16 Ohio St. 527; *Randall v. Randall*, 37 Mich. 571. Some authorities cast upon the husband, when the validity of such a contract is questioned, the burden of showing that the contract was a fair and equitable one, and that it was entered into by the wife with full knowledge of all facts likely to influence her action in the matter.

The present *status* of the main case, upon the pleadings in the district court, presents the question of the validity of the articles of separation as a question of *fact*, to be determined by that court. This being the *status* of the original cause of action, it would be improper for us to go further than may be necessary to determine the single question of jurisdiction, which, as previously stated, is essential to the authority of the court to award alimony *pendente lite*. The question of jurisdiction to entertain the complaint is to be determined by an inspection of the complaint itself. Upon inspection of this pleading, we find it specially charges that the plaintiff was coerced to execute the articles of separation against her free will and consent, under circumstances, and by resort to expedients, which, if established by proof, would render the articles null and void, by all the authorities upon the subject. Whatever the real facts may be, the

allegations of the complaint are sufficient to authorize a court of equity to assume jurisdiction for the purpose of investigating the grievances alleged, and for administering proper relief if the same should be susceptible of proof. The law does not recognize in contracts of this nature any special sanctity relieving them from the general rule applicable to contracts, that fraud vitiates all contracts. On the contrary, they are rather regarded as deeds or agreements entered into by and between persons occupying fiduciary relations to each other, wherein full knowledge and the free will and consent of the weaker party, and good faith and fair dealing on the part of the stronger party, are essential to their validity. These views are sustained, both by reason and authority, as will appear from the foregoing authorities, and the cases cited therein.

The question of jurisdiction being decided in the affirmative, it only remains for us to decide the *third* and last point, viz., is the order or decree awarding temporary alimony a valid decree? This must be determined upon the same rules and principles applicable to orders or decrees for alimony *pendente lite* in other cases. The rule in all cases is based upon the existence of the married relation, the ability of the husband, and the destitute circumstances of the wife. If the wife presents such a case against her husband as *prima facie* entitles her to relief, the rule is that she should be supplied with the necessary means to prosecute her suit on an equal footing with her husband; also if she be destitute of the means of subsistence, and the husband is possessed of means to relieve her necessities, it is the duty of the court, when called upon, to award a reasonable allowance for this purpose. A proper showing should be made by the wife to entitle her to such an order. Her petition praying for such temporary alimony, should be verified and supported by affidavits; but the merits of the original or main controversy cannot be inquired into. The essential facts to be established are, as before stated, the existing marriage relation of the parties, the present destitution of the wife, and the financial ability of the husband. If the wife is in fact destitute of the means of support, it is immaterial, so far as the application for temporary alimony is concerned, what brought about her destitute condition. The only questions upon which the husband can be heard are his own means and the means of the wife. If it should be shown that the wife is possessed of the necessary means, her application should be denied. See *Galland v. Galland*, 38 Cal. 265; *Porter v. Porter*, 41 Miss. 116; *Garland v. Garland*, 50 Miss. 694; *Frith v. Frith*, 18 Ga. 273; *Verner v. Verner*, *supra*; *Foss v. Foss*, *supra*; *Jenkins v. Jenkins*, 91 Ill. 167; *Platner v. Platner*, 23 N. W. Rep. 764, and cases cited; *Culver's Ex'r v. Culver*, 8 B. Mon. 128. Under the rule announced we cannot examine the defense set up by the husband against the allowance prayed in the wife's petition. In it he neither denies his own financial ability to provide temporary support and suit money nor the alleged necessities of the plaintiff. The fact

that he made a liberal provision for her a comparatively short time ago, which she has squandered, does not answer the allegation that she is now destitute, which latter fact is alleged in her petition, and supported by her own and other affidavits.

Our conclusion upon this final question is that the district court had lawful authority to award alimony and suit money *pendente lite*, and that the discretion of the court respecting the sums so awarded was not abused, but, considering all the circumstances bearing upon the question, the allowances made were reasonable. The decretal order appealed from is therefore affirmed.

(9 Colo. 152)

DENVER & R. G. RY. CO. v. COBLEY.

Filed April 16, 1886.

DISMISSAL—ERROR.

It is not error to allow the plaintiff to dismiss his own case, where no counter-claim has been interposed.

Error to district court, Fremont county.

This action was brought against the railway company by the defendant in error to recover damages for injuries received by him as a passenger in one of the railway company's coaches while being carried therein from Pueblo to Canon City. A demurrer was sustained to the original complaint, whereupon the plaintiff filed an amended complaint, which the railway company answered, setting up facts showing that the accident occurred by reason of the plaintiff's negligence in resting his arm on the sill of a car window, allowing the arm to protrude outside the car in which he was riding, and that while remaining thus exposed it came in contact with a freighter's wagon standing near the track, by reason whereof the injury occurred. A default was entered against said plaintiff for failure to file a replication to the defendant's answer within the time prescribed by the court. Counsel for the railway company thereupon moved for judgment on the pleadings. When this motion was called up for hearing the plaintiff moved the court to dismiss his said suit without prejudice. The latter motion was allowed, and the suit dismissed without prejudice, to which action of the court the company, by its counsel, excepted. To reverse this order the railway company sued out this writ of error.

*Macon & Hobson, Wolcott & Milburn, and John M. Waldron*, for plaintiff in error.

BECK, C. J. One of the errors assigned is "that the court below erred in dismissing the cause as it stood upon the pleadings without consent of defendant company; but said cause should have been allowed to go to the jury, and be finally determined upon the facts proved and admitted." The court below committed no error in dismissing the action upon the plaintiff's motion. The Code of Civil Pro-

cedure provided, then as now, that an action might be dismissed, or a judgment of nonsuit entered, by the plaintiff himself, at any time before trial, upon payment of costs, if a counter-claim had not been made. Code Civil Proc. c. 9, § 148. The motion of plaintiff to dismiss his suit was made and the suit was dismissed before trial. It was likewise dismissed, as shown by the order of dismissal, "upon payment of all costs accrued herein." The plaintiff was entitled, as a matter of right, to this order. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Plant v. Fleming*, 20 Cal. 93. The above-cited cases arose upon a similar code provision, and are decisive of all the questions presented by the assignment of errors.

It was within the discretion of the court to dismiss the plaintiff's suit without prejudice. Judgment affirmed.

## SUPREME COURT OF CALIFORNIA.

(69 Cal. 453)

*In re* Estate of DAVIS, Deceased, v. STEPHENS, Ex'r. (No. 11,132.)

Filed April 27, 1886.

**HOMESTEAD — SETTING APART HOMESTEAD TO SURVIVING WIFE OR CHILDREN.**

Under the California Code of Procedure, § 1465, "upon the return of the inventory, or at any subsequent time during the administration of an estate, if no homestead has been selected, designated, and recorded, the court must, on its own motion, or on petition therefor, select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, or, if there be no surviving husband or wife, then for the use of the minor children;" and when an application is made that a homestead be so set apart, the court has no discretion in the matter, but must grant the application; and the power or duty of the court in this respect is not limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside; the power of testamentary disposition of property being not paramount but subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

*J. C. Bates*, for appellant.

*Fisher & Ames*, for respondent.

BELCHER, C. C. Bridget Davis died, leaving a will and two minor children, but no husband. The will was admitted to probate, and an inventory of the property of the estate was duly returned by the executor to the court. From the inventory it appeared that the only property of the estate was a lot with a dwelling-house thereon in the city of San Francisco, which was appraised at the sum of \$850. Shortly after the inventory was filed, the executor presented to the court a petition setting forth, among other things, that the expenses of the last illness of deceased, the funeral charges, and expenses of administration had all been paid; that the lot was the separate property of deceased; and that the minor children were both residing in the dwelling-house on the lot, and were occupying the same as a homestead, and had no other home or property of their own; and praying that the said lot, together with the dwelling-house thereon, be set apart for the use, support, and benefit of the said children. To this petition one William Farmer, a brother of deceased, interposed a demurrer, and objected that the prayer of the petition ought not to be granted, because the deceased had provided in her will that all her property should be sold, and had bequeathed \$500 of the proceeds of the sale to him. The court overruled the objections, and by its decree set apart the lot, with the dwelling-house thereon, as a homestead for the use of, and as the property of, the two minor children. The appeal is by Farmer from this decree.

The Code of Civil Procedure provides that upon the return of the inventory, or at any subsequent time during the administration of an estate, if no homestead has been selected, designated, and recorded, the court must on its own motion, or on petition therefor, select, designate, set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, or, if there be no surviving husband or wife, then for the use of the minor children. Section 1465. When application is made that a homestead be set aside under this section the court has no discretion in the matter, but must grant the application. *Estate of Bullentine*, 45 Cal. 696. Nor is the power or duty of the court in this respect limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside. "The power of testamentary disposition of property, as conferred and defined by statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate." *Sulzberger v. Sulzberger*, 50 Cal. 385.

We see no error in the record and the decree should be affirmed.

We concur: SEARLS, C.; FLOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(69 Cal. 454)

DOUGHERTY v. COFFIN. (No. 9,004.)

Filed April 27, 1888.

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO—CONTRACT FOR STREET WORK—EXTENSION OF TIME.

Where, on a contract for street work in the city and county of San Francisco, the time for the completion of the work had expired without any extension of time being granted to the contractor, and thereafter the board of supervisors extended the time for the completion of the work, such extension was invalid, and not in the power of the board of supervisors.

2. SAME—ASSESSMENT FOR STREET WORK—APPEAL—ESTOPPEL.

In an action to enforce payment of a street assessment, the defendant is not estopped from questioning the validity of the assessment because the owners of the lots protested against an extension of time for the completion of the work after the time provided therefor had expired, and appealed from the assessment to the board of supervisors, where their appeal was dismissed. The assessment in such case was void, and the board of supervisors would have no power to validate it.

3. APPEAL—FINDINGS—EVIDENCE.

Findings held justified by the evidence.

4. SAME—IMMATERIAL ERRORS.

For harmless and immaterial errors judgments are never reversed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

J. C. Bates, for appellant.

*McAllister & Bergin*, for respondent.

BELCHER, C. C. This is an action to enforce payment of a street assessment for grading a portion of Mason street in the city and county of San Francisco. In the court below judgment was entered in favor of the defendant, and the appeal is by the plaintiff from the judgment and an order denying a new trial. It appears from the record that a contract to grade Mason street, from California to Sacramento street, was made and dated January 15, 1873, and the work was to be commenced within 6 days, and completed within 150 days, after its date. Four extensions of the time to complete the work, of 10 days each, were then granted by the board of supervisors, the last expiring July 23, 1873. The work was not completed, and nothing further appears to have been done till March 29, 1875, when a further extension of 645 days was granted. After this time had expired other extensions were granted in 1875, 1876, and 1877. The work was completed in January, 1877, and the assessment was made in April, 1877. In 1876 certain owners of lots affected, requested the board not to grant any further extension of time; and after the assessment was issued they appealed therefrom to the board, and claimed that it had been issued without authority of law, and was void.

1. That the board of supervisors had no power to grant the extension of 645 days, or any subsequent extension, is no longer an open question in this court. It is settled law that when that order was made the contract was dead, and the board had no power to call it back to life. *Beveridge v. Livingstone*, 54 Cal. 54; *Owens v. Heydenfeldt*, 6 Pac. Rep. 423; *Torrens v. Townsend*, Id.; *Fanning v. Schammel*, 9 Pac. Rep. 427.

2. The claim that the defendant is estopped from questioning the validity of the assessment because the owners of lots protested against the extension, and appealed from the assessment to the board, cannot be maintained. The assessment was void, and the board had no power to validate it. To avoid litigation and expense, the owners might properly ask the board to set aside the assessment, but we fail to see how an erroneous refusal to grant their application could create any estoppel against them. As well might it be said, if one against whom a void judgment had been entered should ask the court to set it aside, and his application should be denied, that he would afterwards be estopped from questioning the validity of the judgment. In *Mahoney v. Braverman*, 54 Cal. 565, it appeared that an appeal had been taken from the assessment, which had been dismissed upon the report of the city and county attorney, and it was held that the assessment was void because the work was not completed within the time specified in the contract, and that it was not made valid by the appeal.

3. Conceding that some of the findings are not justified by the evidence, still, the judgment cannot be reversed if finding No. 10 is

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sustained. That finding covers the whole ground of failure to complete the work within the time limited in the contract, and the first four extensions which were properly made. There is no claim that finding No. 10 is not fully justified by the evidence, and the other findings are therefore immaterial. For harmless and immaterial errors, judgments are never reversed.

We find no error in the record, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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DOUGHERTY v. FAIR. (Nos. 9,005, 9,006.)

Filed April 27, 1886.

JUDGMENTS AFFIRMED.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

*J. C. Bates*, for appellant.

*McAllister & Bergin*, for respondent.

BELCHER, C. C. These cases are in every material respect like *Dougherty v. Coffin*, ante, 672, which has just been decided. Upon the authority of that case the judgments and orders denying a new trial in these cases should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgments and orders are affirmed.

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(69 Cal. 255)

LUX and others v. HAGGIN and others. (Nos. 8,587, 8,588.)

Filed April 26, 1886.

1. WATERS AND WATER-COURSES—RIPARIAN RIGHTS—PRIVATE CORPORATION DIVERTING WATER—COMPENSATION.

A private corporation cannot divert the waters of a water-course, and thereby deprive the riparian proprietors of all use of the same, without compensation, made or tendered, to such proprietors.

2. SAME—PROPERTY RIGHTS.

The owners of land by or through which a water-course naturally and usually flows have a right of property in the waters of the stream.

3. SAME—PUBLIC USE—COMPENSATION.

This property may be taken for a *public use*, just compensation being first made or paid into court.

**4. SAME—SUPPLYING WATER TO FARMING NEIGHBORHOODS.**

Water to supply "farming neighborhoods" is a public use; and it is for the legislature to determine whether, in the exercise of the power of eminent domain, it is necessary or expedient to provide further legal machinery for the appropriation (on due compensation) of private rights to the flow of running streams and the distribution of waters thereof to public uses.

**5. CONSTITUTIONAL LAW—EMINENT DOMAIN—COMPENSATION.**

One private person cannot take his property from another, either for the use of the taker or for an alleged public use, without any compensation paid or tendered. Const. art. 1, § 14.

**6. WATERS AND WATER-COURSES—RIPARIAN OWNERS USING WATER FOR IRRIGATION.**

Riparian owners may reasonably use water of the stream for purposes of irrigation.

**7. APPEAL—ERROR—REJECTION OF EVIDENCE.**

The court below erred in rejecting certain evidence offered by the appellants.

MORRISON, C. J., ROSS and MYRICK, JJ., dissent.

In bank. Appeal from superior court, county of Kern.

*Stetson & Houghton and McAllister & Bergin*, for appellants.

*Louis T. Haggin; Garber, Thornton & Bishop, and Flournoy & Mhoon*, for respondents.

McKINSTRY, J. This action was commenced by Charles Lux, Henry Miller, James C. Crocker, and others, as plaintiffs, against James B. Haggin, and many individuals and corporations, as defendants. By dismissals and amendments, Lux, Miller, and Crocker became the only plaintiffs, and the Kern River Land & Canal Company the sole defendant. Since the amended complaint was filed the suit has been prosecuted to obtain a decree enjoining the defendant, the Kern River Land & Canal Company, from diverting waters of Kern river, which, it is alleged, had flowed down a water-course known as "Buena Vista Slough," through lands of the plaintiffs described in the complaint, and which, if not diverted, would have continued so to flow. Plaintiffs have appealed from a judgment in favor of the defendant, and from an order denying a new trial.

Before proceeding to decide what are the respective rights of riparian proprietors and appropriators of water, or to inquire into certain alleged errors of the court in rejecting evidence offered by the plaintiffs at the trial below, we propose to consider points made by respondent, which, if well taken, demanded an affirmance of the judgment, even though "the common law" as to riparian rights now prevails, or formerly prevailed, in this state.

1. *As the case was presented in the court below, the plaintiffs were not estopped from seeking relief by injunction by reason of their laches or delay.*

As a conclusion of law from certain facts found the court below declared "that the plaintiffs have been guilty of such laches and neglect as disentitle them to any relief in this action;" and it is insisted in this court, by counsel for respondent, "that plaintiffs have been guilty of such laches as disentitles them to any relief in equity."

*First.* There are estoppels *in pais*, as where a defendant is induced to act by the declarations or conduct of a plaintiff, which are a defense both at law and equity. Here we cannot discover the elements of such an estoppel. The defendant has acted with full knowledge of all the facts, and, as must be presumed, with full knowledge of the law controlling the rights of the parties. To constitute the estoppel the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 57; *Morrill v. St. Anthony Falls W. P. Co.*, 26 Minn. 229; S. C. 2 N. W. Rep. 842. To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act *with the intention* of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon, or been influenced by, such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. *Brown v. Bowen*, 30 N. Y. 519; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392. In the case before us the fact relied on as proving the estoppel is that plaintiffs had knowledge of the expensive canals and other works of defendant while they were in progress, and did not object to them. The bare fact that ditches, etc., were constructed with the knowledge of the plaintiffs, though at great expense, without objection by plaintiffs, is not sufficient to constitute [such] an estoppel. *Stockman v. Riverside L. & I. Co.*, *supra*.

*Second.* Where an express statute of limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding. And when the defendant relies on mere delay and his own adverse use, the statutory period having expired, he must plead the statute. A party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer. *American Co. v. Bradford*, 27 Cal. 360. Appellants contend that they had five years after their cause of action accrued within which to bring this action. It may be conceded, however, for all the purposes of this case, that the Code of Civil Procedure limited them to four years. It has been repeatedly decided in this state that section 343 of the Code of Civil Procedure ("an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued") applies as well to suits in equity as to actions at law. The same effects, positive and negative, follow from section 343 as from other sections of the Code prescribing the periods within which actions *may* and *must* be commenced. With reference to other limitations, a party cannot be refused a hearing if he shall bring his action within the period named; and as to suits to which

section 343 is applicable, mere lapse of time, less than four years, is not ground for defense. Throughout the Code suits in equity are called "actions." Sections 346 and 347 expressly relate to certain suits in equity. Section 307 declares "there is but one form of civil action," etc. That section does not abolish the distinction recognized by the constitution between law and equity, but it indicates the legislative intent that the subsequent provisions of the code should be applicable to legal and equitable proceedings. The word "hereinbefore," in section 343, has never been held to limit its operation to actions at law, but it has often been held to the contrary.

*Third.* It is said that when a court of equity is asked to exercise its jurisdiction by means of injunction it will decline to intervene when there has been *laches*, although the statutory period of limitation has not expired. It would seem that the discretion of a court of equity in dismissing suits for unreasonable delay (in view of the facts appearing in each particular suit) was originally exercised, and has generally been employed, where there is no statute of limitations directly applicable, or where the statute has been held generally applicable by *analogy*, courts of equity reserving the power to recognize exceptions to the general rule; and, in exercising its prudent discretion in the last class of cases, the court, as the equities demanded, would sometimes dismiss a bill before the corresponding period at law had run, and sometimes entertain a cause long after the running of the time prescribed in the statute. Thus, the power to entertain, or to refuse to entertain, a cause was said to be exercised "independent of any statute of limitations."

Mr. Wood, in his work on Limitations, remarks: "It is generally held by our courts that, except in the single case of concurrent jurisdiction, [where the statute, like a statute in terms relating to suits in equity, operates *ex vigore suo*,] courts of equity may act by analogy or not, as the ends of justice and the strict equity of the case may require." Section 59. It was said by Lord CAMDEN: "From the beginning there has always been a limitation to suits in this court.

\* \* \* But as the court has no legislative authority, it could not properly define the time of bar by a positive rule,—to an hour, a minute, or a year. It was governed by circumstances." Sir THOMAS PLUMMER spoke thus of courts of equity: "They have refused relief to stale demands even when no statutory limitation existed," etc. *Cholmondeley v. Clinton*, 2 Jac. & W. 141. It is said by Mr. Daniell: "When there is no positive limitation the question whether the court will interfere or not depends upon whether, from the facts of the case, the court will infer acquiescence, confirmation, or release." 1 Ch. Pr. 560, 561. And Judge STORY says that, in cases where equity adopts the statutory rule by analogy, it will often treat the lapse of a less period as a presumptive bar, on the ground of discouraging stale claims or gross laches or unexplained acquiescence. Eq. Jur. 1920. The writer on Limitations already quoted says that where the claim

is purely equitable, and there is no express statute barring it, the rights of the party will be enforced without reference to any statute. Wood, Lim. § 59.

It might be claimed on principle that, inasmuch as the conduct of equity with respect to laches, etc., and the statute of limitations, are both based on *public policy*, designed to discourage stale demands, and to protect against possible loss of evidence, when the legislature—the peculiar exponent of the policy of the state—has spoken, (by adopting a positive rule of limitation expressly to suits in equity, in which lapse of time alone is the controlling condition,) the limitations applied by equity to cases not previously within the statute should be regarded as no longer existing or enforceable. It must be conceded, however, that the weight of authority is to the effect that, where the statute of limitations is directly applicable to a suit in equity, a court of chancery may properly refuse to grant relief by injunction when the plaintiff has assented to the acts complained of and their consequences; and that such assent may, in proper cases, be inferred from the plaintiff's *acquiescence* with full knowledge of all the facts. Further, the acquiescence, proving assent, may bar relief in equity, although it may not be accompanied by all the circumstances which would make it an estoppel at law.

Each of the words "delay," "laches," and "acquiescence" has its appropriate meaning. "Laches" would strictly seem to imply *neglect* to do that which ought to have been done; "acquiescence," a resting satisfied with or submission to an existing state of things. "Laches" (at least with other facts) may be evidence of "acquiescence," and "acquiescence" may be evidence of *consent*. In the decisions of the reported cases, however, "laches" has sometimes been employed as the equivalent of mere delay, and sometimes "laches" or "gross laches" as the equivalent of "acquiescence." It is therefore important to consider the context in connection with which either of these expressions has been used by a judge in order to ascertain in what sense it is employed.

Speaking of the distinction between "laches" and "acquiescence," Wood remarks:

"While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. 'Laches' import a merely passive, while 'acquiescence' implies active, assent; and while, when there is no statutory limitation applicable to the case, courts of equity would discourage 'laches,' and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, *as they may when 'acquiescence' has existed*. 'Laches,' in fact, amount only to that inferior species of 'acquiescence' described in the following terms by Lord KINDERSLEY in *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 89: 'Mere "acquiescence" (if by "acquiescence" is to be understood only abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations.'" Lim. § 62.

In cases of concurrent jurisdiction, or where the statute is express, equity will sometimes refuse relief before the statute has run. "But," says the same writer, "this is only in rare and exceptional cases, where the party can be said to have *acquiesced* in the wrong of which he complains," (section 59;) and the same is said in effect in *Reed v. West*, 47 Tex. 240.

It may fairly be deduced from the authorities we have consulted that the acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts. If a degree of acquiescence less than establishes such assent has been regarded in any decision, it will be seen that it has been treated merely as tending to prove some other fact which rendered it inequitable to grant a preventive order. We have tried to look at all the vast number of books referred to by counsel, and have not found any asserted doctrine which directly conflicts with what has just been said.

The granting or refusing a decree of specific performance of contracts for the purchase of lands, when there has been more or less delay, depends on principles somewhat different. *Green v. Covillaud*, 10 Cal. 317; *Delavan v. Duncan*, 49 N. Y. 485. When the purchaser has not complied with his contract he must show why. He must account for his failure in a reasonable manner,—must make out a clear case, and show that the relief he asks is equitable. He comes into court with an admission that he has not done all he agreed to do. *Finch v. Parker*, 49 N. Y. 1. See, also, *Kirby v. Jacobs*, 13 B. Mon. 435; *Weber v. Marshall*, 19 Cal. 447. Nor will equity decree specific performance of a contract when its terms and conditions are uncertain or indefinite. *Harnett v. Yeilding*, 2 Schoales & L. 552.

In *Ferson v. Sanger, Davies*, 264, WARE, D. J., held that the plaintiff was too late in seeking *damages* in equity for an alleged fraud in the sale of land. Some of the cases cited relate to applications for a "preliminary" injunction, where, the equities being doubtful, the preliminary order was denied. *Society v. Holsman*, 5 N. J. Eq. 126; *Attorney General v. Sheffield G. C. Co.*, 3 De Gex, M. & G. 304. In the last case Sir Knight BRUCE observed: "What is now done is not to be considered as deciding what will be done at the hearing of this cause, when possibly an injunction may be granted." And the lord chancellor, CRANWORTH, added he was not prepared to say it would be discreet for the court to interfere "interlocutorily" before the fact had been established, one way or the other, by a trial. Afterwards, when the application came before the chancellor, he denied it on the ground that the plaintiff would be subjected to no serious injury by reason of the temporary obstruction of a street by a gas company.

And so in *Great Western Ry. Co. v. Oxford, W. & W. Ry. Co.*, 3 De Gex, M. & G. 341, Sir Knight BRUCE commences by saying: "It is not now to be determined what order or decree it will be proper to make if these cases shall be before the court for hearing. We are now dealing with interlocutory motions only."

A learned writer on injunctions says: "While delay may not amount to acquiescence in the wrong for which complainant seeks redress, it may yet suffice to prevent his obtaining relief by injunction." High, § 7. In support of this view he refers to *Attorney General v. Sheffield G. C. Co.*, *supra*, and to *Dulin v. Caldwell*, 28 Ga. 117. But the Georgia case was an attempt to enjoin referees from making an award on the ground that the plaintiff (plaintiff also in the cause referred) had been defrauded by reason of the fact that the adverse party, in the cause before the referees, had not fully answered. The chancellor said the plaintiff ought to have made himself acquainted with the contents of the answers, and ought to have excepted to them if insufficient. He had had his day in court.

*Wood v. Sutcliffe*, 2 Sim. (N. S.) 163, was a suit by a manufacturer to enjoin the owner of dyeing works above from fouling the water. The plaintiff had stood by for nearly five years while the defendant was constructing and using his works. Before defendant commenced to turn his dye-stuffs into the stream the sewage of a dense population had rendered the water unfit for plaintiff's purposes, who had in fact ceased to use it. The fouling of the water was an incident to the occupation of the large population, of which (said the chancellor) the plaintiff could not complain. He therefore suffered no injury from the acts of the defendant, and by his long acquiescence had assented to them.

One cannot read the case of *Wicks v. Hunt*, Johns. 372, without perceiving that it did not turn on mere delay or imperfect acquiescence. The complainant had a complete remedy at law, and the court said the English chancery interfered, notwithstanding the existence of a plain legal remedy, *only* "by granting an injunction to prevent irreparable damage before a trial, or on a bill of peace after one or more trials at law." Then there were grave doubts whether the plaintiff had suffered any injury; and Wood, V. C., said: "Under these circumstances it is impossible to interfere until the right has been *tried*, whatever the mode of trying it may be." And the judge said: "If there was no injury (as was contended) from such floods as occurred during the two and a half years of the plaintiff's delay, a serious question might arise on the merits how far the possibility of an injury once in twenty or thirty years would justify the court in interfering with defendant's works."

Equitable relief in many cases depends upon the discretion of the chancellor, and it is true, as said by Bispham, that the *laches* of the complainant is often "one of the most important elements" which is

taken into consideration. But laches, in the sense of delay only, is not important, except as it constitutes, with other circumstances, evidence of acquiescence.

*Meredith v. Sayre*, 32 N. J. Eq. 557, was not decided upon mere delay or laches, in the sense of delay. The complainants waited for a year after a tramway was completed on a street in front of their lots, and this fact was, in view of the circumstances, treated as evidence of acquiescence. The court said: "The property is in an unimproved part of the city. No inconvenience of any account is inflicted on the plaintiffs by the obstruction," etc.

In the two cases last cited, as in *Wood v. Sutcliffe*, *supra*, and other cases, it will appear, on examination, that the fact that the plaintiff had suffered, and would probably suffer, but slight injury, as compared with that to which the defendant would be subjected if the injunction was granted, (or the fact that it remained doubtful whether the plaintiff would suffer injury of any account,) was considered, with the delay, in reaching the conclusion that *acquiescence* was proved. It is perhaps more probable that one will assent to a slight or temporary, than to a grave, serious, and permanent injury.

In *Chesapeake & O. R. Co. v. Bobbett*, 5 W. Va. 138, a bill to enjoin a diversion of waters was held to be insufficient, because it neither alleged the insolvency of the defendant, nor set forth facts showing that a judgment for damages would not be ample redress; and in *Hough v. Doylestown*, 4 Brewst. 333, it is said that injunction will not issue "if the injury be doubtful, eventful, or contingent."

*Varney v. Pope*, 60 Me. 192, decides that injunction to restrain a nuisance cannot be resorted to unless the right of the complainant has been settled at law, or long enjoyed, or the defendant's acts will result in irreparable injury; *Hieskell v. Gross*, 7 Phila. 317, that equity will not relieve by injunction, where the right is disputed, until a trial at law, unless the injury is irreparable, and the necessity urgent, and there is no adequate remedy at law.

*Creighton v. Evans*, 53 Cal. 55, was an action at law to recover damages for a diversion. The plaintiff was a riparian proprietor, and, as the defendant was not, the court held that, in the absence of proof of damages, the plaintiff was entitled to a verdict for nominal damages.

In *Basey v. Gallagher*, 20 Wall. 670, no question was involved as to delay, laches, or acquiescence; nor was there such a question in *Atchison v. Peterson*, Id. 507, which was an issue as between appropriators on the public lands. The supreme court of the United States there said:

"Whether a court of equity will interfere by injunction will depend upon the extent and character of the injury alleged, whether it is irremediable in its nature, whether an action at law will afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

*Sprague v. Steere*, 1 R. I. 247, holds that *acquiescence* may be a bar to the court's interference by injunction. The cases therein considered are to the same effect.

The order was refused in *Bridson v. Benecke*, 12 Beav. 1, because the complainant had not proceeded with due celerity to establish his right at law.

In *Slade v. Sullivan*, 17 Cal. 105, the supreme court refused to reverse the decree of the district court dismissing a bill to enjoin miners from working a ravine a short distance in front of the plaintiff's improvements on the public lands, holding that some of the damage anticipated by the plaintiff was very slight, and the rest "a mere matter of speculation."

*Cotching v. Basset*, 32 Law J. Ch. 286, was an extinguishment of an easement by assent.

In *Birmingham C. Co. v. Lloyd*, 18 Ves. 515, the plaintiffs sought to restrain the defendants from draining water from their own coal mine. The legal rights of the respective parties were disputed. Lord ELDON refused an interlocutory order for an injunction until the plaintiffs' right to damages had been established at law.

In *Parrott v. Palmer*, 3 Mylne & K. 632, chancery refused to enjoin, in the face of long-continued acquiescence in the act of defendants and its consequent injuries, but turned the complainant over to his action at law.

*Maxwell v. Hogg* and *Hogg v. Maxwell* were cross-applications for an injunction order by rival promoters or publishers of magazines, both to be called the "Belgravia." Each was refused the order under circumstances which justified the action of the court. 2 Ch. App. 319.

It appeared in *Bassett v. Salisbury Manuf'g Co.*, 47 N. H. 426, that while the injury done to a small portion of the plaintiff's land (caused by increasing the height of defendants' dam) was *trifling*, the defendants had expended \$850,000 in enlarging their works so that the additional water-power could be put in requisition. Under these circumstances it was held that the fact that the plaintiff stood by for seven or eight years without objection was sufficient evidence of acquiescence to prevent an intervention by injunction.

*Grey v. Ohio & P. R. Co.*, 1 Grant, Cas. 412, was a bill to restrain the defendant from using its railroad across the *common* in Allegheny City. LEWIS, J., said:

"The property taken is hardly of any appreciable value; the right of complainant is at least doubtful. His *acquiescence* until the road was completed renders it impossible to grant the relief applied for without doing irreparable injury to the defendant, while no benefit would be conferred on the complainant which he could not obtain by an action at law."

Two of the judges dissented, and the injunction was refused "on an equal division."

In *Dann v. Spurrier*, 7 Ves. Jr. 235, Lord ELDON remarked:

"I fully subscribe to the doctrine that this court will not permit a man knowingly, though but passively, to encourage another to lay out money *under an erroneous opinion of title*; and the circumstance of looking on is in many cases as strong as terms of encouragement. Still it must be put upon the party to prove that case *by strong and cogent evidence*, leaving *no reasonable doubt* that he acted upon that sort of encouragement."

Mr. Wait observes (6 Act. & Def. 281) that while a court of equity will restrain a party in the use of water in a manner injurious to another, yet the court will not exercise the summary authority "where the right is doubtful, or the facts are not definitely ascertained." This need not be disputed. He adds: "A complainant who asks the court to restrain by injunction must make a strong *prima facie* case in support of the title he asserts, and show that he has been guilty of *no delay* in applying for the interposition of the court." In support of the whole of this statement he cites *Bliss v. Kennedy*, 43 Ill. 67; *Burnham v. Kempton*, 44 N. H. 78; *Shields v. Arndt*, 3 N. J. Eq. 234. In *Bliss v. Kennedy*, however, the court, after saying that, by the law of Illinois, the right of a riparian proprietor must ordinarily be established *at law* before equity will interfere by injunction, holds that equity will restrain until a decision at law, only where the plaintiff has not been guilty of *improper* delay in bringing his action; and the court observes: "We do not think such a case has been made out by the complainants. They do not allege in their bill that they have commenced, or are about to commence, legal proceedings to establish their right, but call upon a court of chancery to establish it in the first instance." The case in 44 N. H. only holds that equity will not take jurisdiction when the parties have a plain and perfect remedy at law, and have neglected to seek it; and the case in Green, that where the right is doubtful it should usually first be established at law. Mr. Wait also says that equity will refuse to interfere "when the damage is not serious," or when it appears that the renewal of the water-course will still leave it impossible for the party claiming it to derive any benefit from it. "But," he adds, "if the injuries by diversion are continuous, *or the right to continue them is set up and persisted in* by the defendant, a court of equity, if the facts be properly established, will interfere by injunction effectually to protect the complainants; and, if the diversion of water complained of is a violation of the plaintiff's right, and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, *there is no more fit case* for the interposition of a court of equity, by way of injunction, to restrain the defendant from such injurious act." 6 Act. & Def. 282.

In *Nosser v. Seeley*, 10 Neb. 460, S. C. 6 N. W. Rep. 755, the plaintiff "solicited employment" in the work he afterwards sought to enjoin. This was strong evidence of assent.

The supreme court of Michigan said: "Except in very clear cases it is better to leave the parties to their legal remedy in the recovery of damages." *Hoxsie v. Hoxsie*, 38 Mich. 77.

*Parke v. Kilham*, 8 Cal. 77, was an action at law to recover certain water and damages, tried by a jury, who rendered a general verdict. The court held that an instruction in the following terms was "substantially correct:"

"That if those from and through whom the plaintiffs claim had the prior right to the waters, and they stood by and saw those from whom the defendant derives his title to the ditch, and the right to the waters of the creek, appropriate the water of the creek, at great expenditure of money and labor, under the mistaken idea that the defendant's vendors were obtaining the first appropriation and did not inform them of the mistake, they, (plaintiffs' vendors,) and the plaintiffs who claim under them, are estopped from setting up their prior right at this time."

In the light of the subsequent decisions it can scarcely be claimed that the facts recited in the instruction constituted an equitable estoppel which could be relied on as a defense at law. It may be that the defendant had the better right. In fact, the defendant's grantors seem to have appropriated the water before the plaintiffs' grantors even "located" the mining claim. It does not appear that the plaintiffs' predecessors ever took actual possession of the mining claim; and even if the "location" of the claim preceded the defendant's appropriation, it does not appear that the manner of the location was such as that defendant's grantors were bound to take notice of it. But, whatever the facts, we cannot assent to the proposition, apparently recognized by the court, that the mere silence of plaintiff's grantors, disconnected from other circumstances in evidence, created an estoppel at law.

In *Edwards v. Allouez M. Co.*, 38 Mich. 46, the court said: "The writ is not *ex debito justitiæ* for any injury threatened or done, but the granting of it must always rest in sound discretion, governed by the nature of the case;" and, as the injury threatened to the plaintiff was small, for which damages at law would be full compensation, the injunction was refused.

*Traphagen v. Mayor, etc.*, 29 N. J. Eq. 208, was a case where the city authorities had already opened a street. The plaintiffs had permitted the authorities to oust them, (without seeking to recover the possession at law,) and to expend a large amount of public funds. The vice-chancellor said the complainants "had encouraged or sanctioned" the action of the public authorities, and "by laches, if not acquiescence," had lost the right to have the use of the street forbidden.

*Demarest v. Hardham*, 34 N. J. Eq. 469, was a bill to enjoin the use of a steam-engine by a book-binder in an adjoining building. The vice-chancellor refused a general injunction, but enjoined the defendant from operating his engine so as to produce a vibration in plaintiff's building, etc. He said an injunction to restrain a lawful business should never be granted, except a plaintiff shows an invasion of a clear legal right which cannot adequately be redressed by damages; but remarked: "Equity takes cognizance of a nuisance

which is permanent in its character, or which produces a constantly recurring grievance, *more readily than any other.*"

The supreme court of the United States has said that a bill for a private nuisance should show that the plaintiff is without adequate legal remedy; but that equity will interfere by injunction where the injury is irreparable, or from its continuance must occasion a constantly recurring grievance; and to justify an injunction until a trial at law can be had, no improper delay in resorting to a court of law must be shown; three years or more of delay precluding a party from relief in equity until he has vindicated his right at law. *Parker v. Woollen Co.*, 2 Black, 545.

*Brown v. Carolina Cent. Ry. Co.*: The injury to plaintiff was trifling, and susceptible of adequate compensation in damages. 83 N. C. 128.

*Fuller v. Inhabitants*: A case of acquiescence. The application was to restrain the appropriation of money alleged to have been collected by a town under an illegal tax levy. 1 Allen, 166.

*Del Monte, etc., Co. v. Pond M. Co.*: An appeal from an order refusing to dissolve a preliminary injunction. 23 Cal. 84.

*Royal Bank v. Grand Junction R. & D. Co.*: The facts are very complicated. While the terms "laches" and "unreasonable delay" are employed with reference to the conduct of the plaintiff, the case shows that these expressions are used to denote an acquiescence or assent, which the plaintiff afterwards sought to withdraw. 125 Mass. 490.

*Brown v. County of Buena Vista*: A bill by the county to enjoin the collection of a judgment against it. The supervisors of the county made two several tax levies for the payment of the judgment after they were expressly notified of its existence, and for what it was recovered. 95 U. S. 157.

*Godden v. Kimmell*: CLIFFORD, J., said: "Where there has been gross laches, and an unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than that specified in the statute of limitations, as a presumptive bar to the claim." 99 U. S. 201.

*Blanchard v. Doering*: Clear case of acquiescence. 23 Wis. 203, 204.

*Sheldon v. Rockwell*: "The plaintiff, by his silence and acquiescence, [for more than 19 years, during most of which time the acts done by defendants were protected and fostered by express statute,] has invited and encouraged the defendants to expend their money," etc. 9 Wis. 161.

Angell says: "No single proprietor, *without consent*, has the right to use the flow of the water in such manner as will be to the prejudice of any other." Water-courses, § 340.

In *Cobb v. Smith*, 16 Wis. 696, the court holds that an acquiescence by the plaintiffs of several years in the flowing of their lands was

such evidence of assent as would authorize the refusal of an injunction. "If the plaintiffs have suffered damage, they have their common-law remedy."

"When a person *acquiesces*, \* \* \* a court of equity will not interfere by injunction, but his remedy at law remains." Wood, Nuis. § 360.

*Estcourt v. Estcourt*: Bill to enjoin the use of a trade-mark. The "hop essence" was an article used by brewers only. The plaintiff waited seven months after advertisement of defendant asserting its rights, and then brought suit. He was unable to show that a single brewer had been misled,—a circumstance on which Lord CAIRNS lays some stress. But there was a conclusive reason why equity should not interfere. The "hop essence" was introduced, recommended, and sold to enable brewers to supply to the public a liquid which they might represent as being made of pure hops, when it was not in fact so made. The chancellor said: "It is not the province of the court to protect speculations of this kind." L. R. 10 Ch. App. 276.

*Wendell v. Van Rensselaer*: A case of complete estoppel. 1 Johns. Ch. 344.

In *Ware v. Regent's C. Co.* 3 De Gex & J. 230, the plaintiff's lands had been temporarily flooded, but there was no threatened future injury. The weight which may possibly be given to mere delay is suggested by the remark of the chancellor, who said that although the delay did not amount to *absolute proof of acquiescence*, yet "it was calculated to throw considerable doubt upon the reality of the plaintiff's injury."

*Goodin v. Cincinnati & W. C. Co.*: Held, in effect, that one who permits "a public railroad to be constructed over his land" cannot, after large expenditures made on the faith of his apparent *acquiescence*, enjoin its use. There remains only the right of compensation. 18 Ohio St. 169.

*Wiggin v. Mayor, etc.*: An attempt to enjoin the collection of a local assessment for improving a street in New York city. Held, after the report of the commissioners of assessment was approved by the supreme court, (in accordance with the statute,) equity would not interfere to correct their estimates. Further, if the proceedings of the common council were void, a sale of the complainant's property would not cast a cloud on his title. 9 Paige, 24.

The master of the rolls said that acquiescence in the erection of noxious works, while they produce little injury, does not warrant the subsequent enlargement of them to an extent productive of great damage. *Bankart v. Houghton*, 27 Beav. 425.

Mr. Spence writes: "The court of chancery will therefore, in many cases, refuse to give its aid in favor of an equitable claim, though a less period than the corresponding statutory period shall have elapsed, if the length of time and *circumstances of the case* shall require the application of that principle." Eq. Jur. 61.

*In re Lord*: "For the peace of society, equity will refuse to interfere when there has been gross neglect in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 78 N. Y. 112.

*Gaunt v. Fynney*: The court refused injunction when a trifling, though continuous, trespass had been submitted to for six years, but left the plaintiffs to their rights at law. 8 Ch. App. 14.

*Fullwood v. Fullwood*: The chancellor said: "Mere lapse of time, unaccompanied by anything else, has just as much effect, and no more, in barring an injunction, as it has in barring an action for deceit." "In saying this I do not shut my eyes to the possible existence of a purely equitable defense, such as acquiescence," etc. 9 Ch. Div. 176.

In *Burden v. Stein*, 27 Ala. 104, it was held: (1) A riparian proprietor may enjoin in equity without first establishing his right at law; (2) that while in cases where the plaintiff's right is not clear until established at law equity will refuse to enjoin if it is shown that he has been guilty of improper delay, the principle has no application where his right is clear, and of such a character as entitles him to ask for the interference of equity without resorting to law in the first instance.

*Thomas v. Woodman*: The only injury complained of by plaintiff was an offensive odor arising from the decay of *grass* accumulating in the bed of a stream near his premises. The plaintiff knew the "full consequences" for two years before applying for relief. 23 Kan. 217.

In *Corning v. Troy I. & N. Factory*, 40 N. Y. 191, the court of appeals was divided. The judges agreed, however, that equity will interfere, by mandatory injunction, to compel the restoration of running water to its natural channel; and that, *since the Code*, it is not necessary that plaintiff's right should be first established at law. A minority of the judges thought the circumstances, in view of the great loss and injury to the defendant, the slight advantage to be gained to the plaintiff by a restoration of the water, the *assent* of plaintiff's grantor to the building of permanent and expensive works during the lease, and the delay of the plaintiff after the expiration of the lease, rendered the issuing of an injunction improper. The majority held these conditions did not deprive the plaintiff of his right to equitable relief.

In *Corning v. Troy I. & N. Factory*, 39 Barb. 312, the court said: "In order to estop the owner of a water-right, in equity, from enforcing his right on the ground of his knowledge of and acquiescence in the making of expenditures and improvements thereon by another, the *consent and agreement* of such owner thereto ought to be established by the clearest and most satisfactory evidence." This statement is said to be a mere *dictum*, but it appears to us to be substantially a correct exposition of the rule. In the light of the authorities,

it seems clear that the acquiescence of the plaintiff, which will deprive him of his right to appeal to equity, must be such as proves his intelligent assent.

It may be that delay in seeking relief may tend, in some appreciable degree, to strengthen the probability that plaintiff has assented to a slight injury, or tend, in connection with the other evidence, to show that he has suffered no real injury, as suggested in *Ware v. Regent's C. Co.*, *supra*. But, in every case, the question returns, has the plaintiff assented to the acts of the defendant? We see no error in the statement (*Corning v. Troy I. & N. Factory*, *supra*) that the "consent and agreement" of the plaintiff must appear. It perhaps adds no force to this statement to say that the consent ought to be established by "the clearest and most satisfactory" evidence, although similar language was used by Lord ELDON. *Dann v. Spurrer*, *supra*.

Under our Codes the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied; but, if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability.

In considering the question whether, in the case at bar, the plaintiffs assented to the acts of the defendant, and the injuries caused by those acts, we are bound to assume that the waters of Kern river, in their natural course, ordinarily flow to the lands described in the complaint, or to a considerable part of them; because there was a substantial conflict in the evidence as to that matter, and the court below erred in rejecting certain testimony bearing on that issue. We must also assume that plaintiffs were the owners or entitled to the possession of such lands when the defendant's alleged right to appropriate the waters began; because, if the certificates hereinafter spoken of had been admitted in evidence, the certificates of purchase would have proved the right of exclusive possession. Moreover, we must assume that the injury to the plaintiffs was of the character and extent which the evidence tended to prove; because, if any injuries flowed to plaintiffs from defendant's acts, there was no conflict as to the nature of those injuries.

The injury to the plaintiffs, so far as it had already accrued, was, *perhaps*, such as could have been compensated in money damages. But even if this should be conceded, the defendant has asserted its

right to continue its diversions, and throughout these proceedings has persisted in that assertion. The entire injury, already accrued and future, is irremediable at law, since a judgment for damages would not constitute complete and adequate redress, within the meaning of the decisions. We cannot so hold, in view of the nature and extent of the injuries, unless we hold that the riparian proprietor can never ask for an injunction when future diversions of waters are threatened; and the adjudications to the contrary are very numerous. So to hold would be to cast upon the plaintiffs the burden of bringing and maintaining a multiplicity of suits at law. The continuation of the diversions must result in constantly renewed grievances, and might result in the acquisition of an adverse right by the defendant, and while the defendant has expended very large sums of money, the evidence tends to prove that neither the injury already inflicted on the plaintiffs, nor that to be anticipated, is slight or trivial, but that it is great and substantial. Under these circumstances we must decline to hold that, by their omission to bring this action sooner than it was brought, (with actual or presumed knowledge of the things done by the defendant,) the plaintiffs are shown to have acquiesced in the defendant's diversion of the water, and the consequences thereof, in such manner as that the assertion of their rights in this action is to be treated as an attempt to ignore or to recede from a previous assent.

A finding of unreasonable laches often assumes the existence at one time of a cause of action. But the facts found by the court below, on which is based the conclusion of laches, do not show assent, unless the plaintiffs must be held to have assented because they ought to have ascertained that the necessary consequences of the projected works of the defendant would be to deprive them of water which naturally flowed to their lands, or unless the delay to sue after the water ceased to flow, as a consequence of defendant's works, was, under all the circumstances, evidence of assent. The facts from which the conclusion of laches and neglect is drawn, if sustained by the evidence, are sustained only by evidence of silence on the part of the plaintiffs with knowledge, proved or presumed, from the notoriety of the acts and claims of defendant.

The inherent difficulty of anticipating, in the fall of 1875, when "a small quantity of water" was used by the defendant, what would be the results of the completed canal, or when a considerable progress should be made in its construction, is a sufficient answer to the suggestion that the plaintiffs should then have known those results. If, immediately after the work done in 1875, the plaintiffs had applied for an injunction, would a court of equity have granted it upon facts which would have shown a possible or contingent serious injury? It would have been obligatory on the plaintiffs, at least, to establish clearly that the threatened acts, if consummated, would result in grave injury to them; and in view of the many streams in that region, the various currents of some of them, and the other natural

features of the country, it would have been extremely difficult, if not impossible, to prove that such injury would follow. And, although the court found that the defendant continuously prosecuted its works, it does not appear from the findings how far those works were extended, or what were their consequences, at any point of time before the plaintiffs began to suffer the real, serious, and substantial injuries of which they complain.

The conclusion of law cannot be treated as a finding of fact. It is called a "conclusion of law" in the decision, and is in the form of a proposition of law,—“such laches and neglect as disentitle the plaintiffs,” etc. It does not respond to facts pleaded, nor is it a direct finding of the fact of assent. But, if it were a finding of fact, the evidence does not sustain it. The evidence, although it may be circumstantial, must affirmatively *prove* the assent. It is urged, however, that the defendant was not bound to plead, nor (since the findings need respond only to the material issues made by the pleadings) was the court bound to find the plaintiffs' consent, or the laches or acquiescence which would prove consent; that the matter of laches or neglect or acquiescence arises out of the *evidence*; and that a court of equity may and ought, *sua sponte*, to deny relief where an appeal is made to its discretionary power of granting or refusing an injunction, when there has been unreasonable delay (which, in view of the circumstances, shows assent) in seeking its preventive process. If all this were conceded, the question would become an original one in this court, and the rule (if it were applicable otherwise) that this court will not interfere to set aside a finding when there is a substantial conflict in the evidence would not be applicable. As an original question the evidence sent here does not prove assent. We are convinced that if the question were submitted to a jury upon that evidence a verdict of assent could not be upheld.

2. *The plaintiffs are not estopped from maintaining this action by reason of their assent to and approval of certain acts of a third person,—the Kern Valley Water Company.*

The next question is cognate to the one just discussed. It arises on certain findings from which, respondent contends, it appears plaintiffs lost their right to complain of any diversion of water before the commencement of this action.

The court below found—

“That the waters of Kern river do not, and never did, naturally and usually flow to, through, along, by, over, or upon the said lands of plaintiffs, or any part thereof; and that, until the year 1876, whatever of the water of Kern river flowed to or reached the said lands, or any part thereof, was from the unusual and extraordinary overflow of said river, or of Kern and Buena Vista lakes, or from the percolation and seepage in these findings mentioned.

“That in December, 1875, one Souther commenced, and in January, 1876, completed, a dam across Buena Vista slough, at a point designated on the map hereto annexed as ‘Cole’s Crossing,’ on or about section five, (5.) township thirty-one (31) south, range twenty-five (25) east, Mount Diablo base and me-

ridian, and south of where the waters of New river enter Buena Vista slough, and thereby, at said point, checked the natural flow of the waters of said river through said slough into Buena Vista and Kern lakes; and caused the waters there flowing to take a northward course, and away from the said lakes; that in March, 1876, the pressure of the waters against said dam broke through the same and said river resumed its natural flow to Buena Vista and Kern lakes; that during the said interval of its flow northward, the waters of said New river flowed along said Buena Vista slough and the adjacent country to and over Buena Vista swamp.

"That in the fall of 1876 certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto annexed, and marked respectively 'East Side Canal' and 'Kern Valley Water Company's Canal.' The said 'East Side Canal' commences on section fourteen, (14,) township thirty (30) south, range twenty-four (24) east, and extends thence some three (3) miles north, on the eastern side of the said Buena Vista swamp, and does not touch any of said lands of the plaintiffs. The other canal, heading on section fourteen, (14,) township thirty (30) south, range twenty-four (24) east, as at present constructed, extends northward some twenty-four miles, is one hundred and twenty feet wide on the bottom, one hundred and forty feet wide on the top, and ten feet deep, with a fall of one foot per mile, and capable of carrying more than twelve hundred cubic feet of flowing water per second, and terminates at a point outside of said lands of plaintiffs.

"That in June, 1877, the Kern Valley Water Company, a corporation organized and existing under the laws of California for the purpose of acquiring canals and water-rights in said county of Kern and elsewhere within this state, to be used or disposed of for irrigation, transportation, domestic, mechanical, and other purposes, took possession and control of said canals, and thenceforth continued the construction thereof northward towards the lake known as 'Tulare Lake,' designated on said map; that, in the fall of the year 1877, the said Kern Valley Water Company reconstructed the said dam at Cole's crossing, and, in connection therewith, constructed a levee extending westward to the bluffs on high ground, and running eastward from said dam about one and one-quarter miles, as shown on said map, thereby preventing the waters of Kern river from flowing to Buena Vista lake and turning the same northward to their said two canals; that at the head of said canals, and in conjunction therewith, the said Kern Valley Water Company, in 1877, constructed a certain other dam and levee, extending completely across the said Buena Vista swamp, as shown on said map, and thereby completely obstructed and prevented the natural flow of any water into, through, or over said swamp northward of said last-mentioned levee, and appropriated and took possession and control of all the waters reaching said levee, and turned the same into the said canals; that the said dam and levee last mentioned are some distance southward from the southernmost part of the said lands of the plaintiffs, and from and after their construction no water has naturally flowed, or could naturally flow, beyond the head of said canals, or to or upon the said lands of the plaintiffs, or any part thereof.

"That the construction of the canals, dams, and levees described in the preceding finding was undertaken and prosecuted *with the knowledge, consent, and approval of the plaintiffs*; that the levee last described in said preceding finding was constructed for the purpose of diverting all the water reaching said levee into the said canals, and such levee does entirely obstruct, and since its construction has obstructed, the natural flow of any water northward in said Buena Vista swamp, beyond said levee, and diverts the same into said canals, and that the plaintiffs, at and before the time of the commencement of the construction of the said levee, knew of the purposes thereof, and approved the same, and knew of the beginning and prosecution of the con-

struction thereof, and consented to and approved of such construction; that said canals and levee were constructed at great expense, *and because of and in reliance upon the said approval and consent of the plaintiffs, and but for such approval and consent would not have been constructed.*"

The notice of appropriation of 74,000 inches of water was posted and filed for record by defendant's assignors May 4, 1875. Their subsequent acts (it may here be conceded) related back to the posting and filing of the notice. It may well be doubted whether the evidence sustains the finding that the plaintiffs consented to and approved of the canals and dams mentioned in the foregoing findings. We shall assume, however, that there was a substantial conflict in the evidence in that regard. The building of the two dams, and the assent of the plaintiffs thereto, as found by the court, intervened between the appropriation by defendant's assignors and the commencement of this action. The construction of the dam at Cole's crossing, with or without the plaintiffs' consent, is unimportant, (with reference to the question we are about to consider,) if the waters of Kern river have never naturally or usually flowed to their lands. The plaintiffs did not become riparian proprietors by reason of a diversion of the waters of Kern river towards their land, (caused by the dam at Cole's crossing,) with any right to complain of an appropriation made by the defendant, or its assignors *above* Cole's crossing, and *before* the dam was constructed at that place; and, on the other hand, if part of the waters of Kern river, in their usual and natural flow, reached the lands of plaintiffs, (and they were deprived of it by defendant,) it is immaterial that more water was turned in their direction by the dam at Cole's crossing.

It is said by appellants that since the court found the waters of Kern river never naturally and usually flowed to the lands of the plaintiffs, the findings last recited must be read as a finding that the levee near the head of the canals was built for the purpose of diverting, and did divert, into the canals of the Kern Valley Water Company, only the waters turned toward plaintiffs' lands by the dam at Cole's crossing, and the waters of extraordinary overflows. But as the court found that the levee last mentioned prevented the passage of *any* water to the northward thereof, the respondent is entitled to the benefit of the findings in the alternative; that is, as declaring that, even if the waters of Kern river, in their natural and usual flow, would reach the plaintiffs' lands, the plaintiffs had consented to the erection of a dam or levee by the Kern Valley Water Company which diverted all such waters from their lands.

Section 811 of the Civil Code provides that the servitude may be extinguished by the performance of any act by the owner of the servitude, or with his assent, upon either the dominant or servient tenement, which is inconsistent with its nature or exercise. This seems to be a recognition and statutory declaration of the rule which Prof. Washburn says has become well settled, that if the owner of a dom-

inant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. *Easem. & Serv.* 560. The same writer says that, as forming the subject of property in connection with realty, water may be viewed in two lights,—one, as one of the elements of which an estate is composed; the other, as being valuable alone for its use, to be enjoyed in connection with the occupation of the soil. "In the latter sense it constitutes an incorporeal hereditament to which the term 'easement' is [has been] applied. *Id.* 207. The flow of the water to and over the riparian lands is not a mere easement, (*Stokoe v. Singers*, 8 El. & Bl. 36;) but the riparian right, while more than an easement, may be said to include the qualities of an easement.

In section 801 of the Civil Code, among "land burdens or servitudes upon land," are enumerated "the right of receiving water from land," and "the right of having water flow without diminution or disturbance of any kind," which last includes the right to have a natural water-course flow, subject to such diminution as results necessarily from a reasonable use by a superior riparian proprietor. It has been held that when the lower proprietor licenses the upper to divert water which would flow to the lands of the licensor, and the licensee has executed the license, the licensor does not *grant* the servitude within the prohibition of the statute of frauds, but rather is estopped from asserting any right in it. It is not necessary to enter into that question. Whether the executed license would or would not be an executed *contract*, whether the transaction would or would not operate a transfer from the licensor to the licensee, section 811 of the Civil Code declares that the effect is to "extinguish" the servitude. The legislature had as much power to make this enactment as to pass a statute of frauds. The possession of the Kern Valley Water Company, at the points where water was taken, was perhaps some evidence of its riparian ownership. But if the act is to be done by the licensee, on a third person's estate, and the license be executed, it cannot be revoked. *Washb. Easem.* 563.

Appellants claim that the evidence with respect to the consent of plaintiffs to the diversion by the Kern Valley Water Company was not admissible under the allegations of the answer, because defendant did not plead therein the facts establishing license and its execution. Counsel refer to *Humphreys v. McCall*, 9 Cal. 59, where it was held, in an action for damages for the diversion of water appropriated by plaintiffs on the public lands, the defendants having pleaded the general issue only, that it was not competent for the defendants to prove that a prior claim to the water existed in a third person, but that such defense should have been specially pleaded. That case turned on a priority of occupation, as between the plain-

tiffs and defendants, and even if a still earlier occupation, by a third person, had been pleaded, it would have constituted no defense to an action brought for a diversion of water appropriated by plaintiffs previous to any appropriation by the defendants, unless the defendants connected themselves with the third person, the first appropriator. In the case now before us it was for the plaintiffs to show that they were entitled to the flow of the stream, or of some part of it, when this action was commenced. If their right to the flow was legally extinguished prior to the commencement of the action, we cannot perceive why defendant was not entitled to prove the fact under the denials of the answer. If, therefore, the findings last above referred to are sustained by the evidence, or there is a substantial conflict in the evidence with respect to the matters set forth in those findings, the judgment and order must be affirmed.

It is to be observed that plaintiffs count upon their ownership of the banks of Buena Vista slough. If they licensed the Kern Valley Water Company permanently to divert the waters from the slough, and by expenditures on the part of the company the license was executed, plaintiffs cannot recover, whatever the purposes of the diversion, although these included a purpose to benefit the lands of plaintiffs by draining them, and the conduct of the water to a point below such lands, or even a purpose to irrigate the plaintiffs' lands through gates in the canals of the company at points separated from the channel of the slough; however it might be (supposing plaintiffs had counted on their ownership of the banks of one of the canals) if it appeared that all the stock of the Kern Valley Water Company was owned by the riparian proprietors below the places of diversion of water from the slough, so that the corporation might be treated as the mere instrumentality through which the riparian proprietors carried out a design, agreed upon among themselves, to change the channel of the slough in such manner as to provide more effectually for the irrigation of their lands. Here such facts do not appear from the findings or evidence. The corporation was a distinct entity in which the plaintiffs were in no way interested, except that there was evidence tending to prove that one (perhaps all) of them was a stockholder in it. Besides, as we have seen, the plaintiffs do not base their claim for relief on the statement in their bill of complaint that they are riparian proprietors on the new or artificial water-course. If, however, it should be conceded that all the plaintiffs consented to and approved of the construction by the Kern Valley Water Company of the dam or levee across the swamps immediately below the east side and Kern Valley Water Company's canals, this fact, of itself, would not entirely extinguish the rights of plaintiffs to the flow of the water-course, unless the dam, as built and consented to by plaintiffs, obstructed and prevented the natural flow of every portion of the water (except, perhaps, mere leakage) through Buena Vista slough to land of the plaintiffs.

The court below found that the levee made by the Kern Valley Water Company prevented "the natural flow of any water into, through, or over said swamp northward of said levee;" and that, after the construction of said levee or dam, "no water has naturally flowed, or could flow, northward, and beyond the head of said canals, to or upon said land of the plaintiffs, or any part thereof." But there was uncontradicted testimony that there was a head-gate in the dam or levee, at a place designated by the witnesses as the place where the levee crossed the slough, which was at times open, and through which, when open, water flowed in the slough. The court did not find the existence of the head-gate, and there is neither finding, nor definite and distinct evidence, from which can be ascertained what was the arrangement or agreement between the plaintiffs and the water company, if any, with reference to the control and management of the head-gate. The court found that the plaintiffs consented to the building of the dam, and found that, as built, the dam entirely obstructed the flow of the water.

It is urged by appellants that the very fact of the existence of the head-gate in the slough, unexplained, proves that plaintiffs retained a right to water flowing there. But it is enough if the facts proved do not affirmatively establish that the easement was entirely extinguished. The levee, as constructed, did not permanently and continuously stop the flow of all the water, and the license of plaintiffs was no broader than its execution. Although the defendant was not bound to *plead* a license given and executed prior to the commencement of the suit, the burden was on the defendant of *proving* that plaintiffs had assented to acts of the Kern Valley Water Company which permanently deprived them of all the water. It was by such assent only that they could estop themselves from claiming the benefit of any of the water.

It may be contended, on behalf of respondent, the presumption is that the gate built by the Kern Valley Water Company, as part of its work, was under the control of the company; and, in the absence of evidence of a reservation by plaintiffs of a right to *enter upon the possession* of the company and open the gate, or of a right to demand that the Kern Valley Water Company should open it whenever plaintiffs might choose to exercise the right, or open it at definite times, or for certain periods, the court below was justified in finding that plaintiffs consented to a permanent occlusion of all the waters; and that such finding included and implied a finding that the license was not limited or restricted. The question is not free from difficulty. It is apparent the court below considered the facts that the head-gate was there, that it was at times open, and that when open water flowed through it, as immaterial factors in the evidence on which it based its conclusion that the dam, as erected and assented to, entirely obstructed the flow of the stream. The court, in effect, held that it was for the plaintiffs to prove affirmatively the reservation of a right

to the flow at their option or at specified times. Doubtless the conclusion that plaintiffs licensed a diversion of all the waters was based in part upon the presumption (in the absence of evidence to the contrary) that it was intended the water company should have entire control of its own head-gate; but this, it is argued, is a presumption of fact which the court could properly indulge.

Suppose the single issue between these parties was whether the license was general, extending to all the waters, or was limited, the burden of showing its general character being on the defendant. In such case, it might be asked, would not the defendant have made out its case *prima facie*, at least, by proving the consent of the plaintiffs to the construction of the levee, although it was built with a gate through which waters might flow if it should be opened? Would the *possible* fact—not proved—that plaintiffs may have reserved the right to have the gate opened when they demanded it, or for a definite part of future time as time should pass, be considered as overcoming the presumption that the Kern Valley Water Company has the control of its own property. If so, it may be claimed, the case must constitute an exception to the general rule that the burden of proof is cast upon the opposite party when the party having the affirmative has established the issue on his part *prima facie*. But here the burden was on the defendant of proving that the right of the plaintiffs to the flow of all the water was extinguished. It would not have been sufficient that it was made to appear that plaintiffs had assented to a diversion of a portion of the waters, any more than it would have been sufficient to prove that plaintiffs had granted a portion of the waters. In either case the plaintiffs would not have lost nor parted with the right to be protected in the enjoyment of the waters they retained.

Until it was made to appear that plaintiffs had lost the right to the flow of any part of the stream, the presumption would be that they retained a right to all; and, in presence of the fact that the work they assented to did not actually deprive them of all the water, their right to the water which flowed through the gate, either continuously or at intervals, was not extinguished. To apply the presumption that every man has a right to control his own property for the benefit of the defendant alone, is to assume, not only that the *gate* belonged to the Kern Valley Water Company, but that the *water also* (or its exclusive use) which flowed through the gate belonged to that company, in entire disregard of the presumption that the plaintiffs retained every right to the flow of the stream which was not affirmatively shown to have been lost. Thus a disputable presumption (applicable to the use of the gate) would be made to overthrow a presumption applicable to the use of the water. The defendant could not establish that plaintiffs were estopped from asserting that they had a right to the flow of any part of the water—either *prima facie* or conclusively—except by proving facts which necessarily precluded the retention by plaintiffs of any part of it. The defendant could not rely upon a pre-

sumption drawn from facts which did not necessarily exclude a retention by plaintiffs of a right to the flow of some of the waters, in opposition to the legal proposition that plaintiffs had lost only the right which was affirmatively proved to have been extinguished. Of course, on a retrial of this cause the evidence may establish an extinguishment of the plaintiffs' rights—if they ever had any—to the flow of every portion of the waters of Buena Vista slough to their lands. On this appeal we confine ourselves to the findings and testimony in the transcript now here.

3. *While the argument ab inconvenienti should have its proper weight in ascertaining what the law is, there is no "public policy" which can empower the courts to disregard the law, or, because of an asserted benefit to many persons, (in itself doubtful,) to overthrow the settled law. This court has no power to legislate, especially none to legislate in such manner as to deprive citizens of their vested rights.*

*The riparian owner's property in the water of a stream may (on payment of due compensation to him) be taken to supply "farming neighborhoods" with water.*

*In case further legislation shall be deemed expedient for the distribution of water to public uses, (the private right being paid for,) the validity of such further legislation is to be determined after its enactment, if its validity shall then be questioned.*

The respondent contends that it is entirely immaterial what errors were committed by the court below upon the supposition that plaintiffs, as riparian proprietors, have some rights to the flow of the stream through their lands, since the plaintiffs have in fact no right to the use of the waters as against the defendant, which has appropriated them in accordance with the provisions of the Civil Code; and this, notwithstanding the statute of 1850, adopting the common law as "the rule of decision," and the section of the Civil Code providing that "the rights of riparian proprietors are not affected" by the provisions relating to appropriations of waters. Section 1422. This court has held that the property of a riparian owner in the waters flowing through his land may, upon due compensation to him, be condemned to the public use by proceedings initiated by a corporation organized to supply a town with water. *St. Helena W. Co. v. Forbes*, 62 Cal. 182. In the learned opinions of Justices Ross and MYRICK in that case the right of the riparian proprietor to the use of the water is designated "property;" an "incident of property in the land inseparably annexed to the soil," as part and parcel of it; "an incorporeal hereditament appertaining to the land." The main question in the case was whether the Code provided for a condemnation of that species of property to public uses. The question was answered in the affirmative. And it has been held in New York that the taking of a stream of water (on due compensation) for the supply of a town was a proper exercise of the power of eminent domain. *Gardner v. Newburgh*, 2 Johns. Ch. 162. On like principles the same property right may

be taken for any public use. In every case, however, the provisions of the statute, as to the mode and manner of conducting the condemnation proceedings, must be strictly pursued. Private property may be taken or damaged for public use, due compensation being made, or paid into court. Const. art. 1, § 14. But another provision of the supreme law is equally operative: "No person shall be deprived \* \* \* of property without due process of law." Article 1, § 13. A legislative act declaring the necessity for taking the property for public use, or the judgment of a court that the necessity exists, when the statute puts the power in a court, is "the law of the land." Cooley, Const. Lim. 528.

Section 1001 of the Civil Code provides:

"Any person may, without further legislation, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner, or by proceedings had under the provisions of title 7, pt. 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, 1872."

And Judge COOLEY observes that either a corporation or individual may be made the agent of the state to prosecute proceedings for condemnation. The same writer says: "The question what is a public use is always a question of law. Deference will be paid to the legislative judgment, as expressed in enactments providing for the appropriation of property, but it will not be conclusive." Cooley, Const. Lim. 536. See, also, note. With respect to the subject in hand the judgment of the legislature of this state has been expressed. Among the public uses, in behalf of which the right of eminent domain may be exercised, are "canals, ditches, flumes, aqueducts, and pipes, for public transportation, and for supplying mines and farming neighborhoods with water." Code Civil Proc. 1238.

Chancellor KENT has written:

"If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." 2 Comm. 340.

Upon this principle the power has been employed for many objects. Not only the direct agents of the government, but individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the *public benefit* derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or by individual enterprise. Cooley, Const. Lim.

532; citing Chancellor WALWORTH in *Beekman v. Railroad Co.*, 3 Paige, 45-73, and *Willson v. Blackbird, etc., Co.*, 2 Pet. 245. With reference to the phrase of Chancellor KENT, "where the public interest can in any way be promoted," COOLEY says: "It would not be entirely safe to apply it with much liberality." He adds that private property may not be taken for objects which may merely "tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste. \* \* \* The common law has never sanctioned an appropriation of property based on these considerations alone, and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. *The reason of the case*, and the settled practice of free governments, must be our guides in determining what is and what is not a public use; and that only can be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." Now the drinking of water is everywhere spoken as a "natural," or at least primary, use. Yet, when water is entirely taken away from the riparian proprietor to supply a city or town, the use of it has never been limited to that which may be required merely for the support of the *lives* of the citizens; but the water thus appropriated to the "public use" may be consumed also for lavation, and for all other purposes to which the element is ordinarily applied; as for irrigating private plats or yards, and public squares and parks; the watering of the streets, etc. It would seem utterly impracticable to limit the uses to which the citizens or villagers may apply it, or to the quantity to be used by each, except by reference to the quantity introduced. In such cases the riparian proprietor may be deprived of its use for *primary* purposes, that it may be devoted to such as have generally been deemed secondary. Why, then, may he not be deprived of the water when the law-makers decide that its application elsewhere for irrigation is a public use?

It is the rule that where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in that regard. *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147. To this yielding to the legislative judgment there is but one exception; that is, when the property of the citizen is taken or sought to be taken for a use in *no sense* public; or, in the language of Chancellor WALWORTH, (*Varick v. Smith*, 5 Paige, 159,) "where there is no foundation for a pretense that the public is to be benefited thereby." *Consolidated C. Co. v. Central Pac. R. Co.* 51 Cal. 269. We are not prepared to say that the supply of water to "farming neighborhoods" for irrigation (and

the Code evidently means for irrigation) may not be for a public use. Indeed, in view of the climate and arid soil in parts of the state, (for this object climate and soil may properly be considered,) it is safe to say that the supply for such use may be that which the legislature has decided it to be,—a public use. The judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts.

It is apparent that in deciding whether a use was public the legislature was not limited by the mere *number* of persons to be immediately benefited as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state, or of a county or city, and rarely that all within the smallest political subdivision can, as a fact, immediately enjoy every public use. Nor need the enjoyment of a public use be *unconditional*. A citizen of a municipality to which water has been brought, by a person or corporation, which, as agent of the government, has exercised the power of eminent domain, can demand water only on payment of the established rate, and on compliance with reasonable rules and regulations. And while the court will hold the use private where it appears that the government or public *cannot* have any interest in it, the legislature, in determining the expediency of declaring a use public, may no doubt properly take into the consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived to the people at large from the dedication.

It may be that, under the physical conditions existing in some portions of the state, irrigation is not, theoretically, a "natural want," in the sense that living creatures cannot exist without it; but its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, from the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use; therefore a public use. The words "farming neighborhoods" are somewhat indefinite; the idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course "farming neighborhood" implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a "farming neighborhood." A very exact definition of the word is not, however, of paramount importance. The main purpose of the statutes is to provide a mode by which the state, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted.

The same agent of the state may take water to more than one farming neighborhood. It must always be borne in mind that under the Codes no man, or set of men, can take another's property for his own *exclusive* use. Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates, and being subjected to reasonable regulations; and whether the quantity sought to be condemned is reasonably necessary to supply the public use in a neighborhood or neighborhoods must be determined by the court in which the proceedings are brought for condemnation of the private right.

In proceedings brought to secure the appropriation of private property to a public use, as in all other legal proceedings, a pretense cannot be set up as a fact,—a *sham* for a reality. The facts, it must be presumed, will always be fairly determined in such particular case. Of course, in each case, the question whether the use to which by statute the water is to be devoted is a public use is a judicial question; but the rule is that the courts hold it to be such whenever the legislature has declared it to be public, unless it clearly appears that it is only private, and that the attempt to take it is therefore a violation of the constitution. From what is said above no inference is to be drawn as to the exact limits, in every respect, of the legislative power to declare a use public. We are only called on to say that sections of the Codes which provide for taking water from riparian proprietors (on due compensation) to supply "farming neighborhoods" are constitutional and valid. Whether, in any supposable instance, the public has such interest in a use which can be directly enjoyed only by an individual for his profit, and without any concomitant duty from him to the public, as that the government may be justified in employing the eminent domain power for the use, as for a public use, is a question somewhat startling, but which is not involved in the decision of the present action. In case further legislation shall be deemed expedient for the distribution of waters to public uses, we leave its validity to be determined after its enactment, if its invalidity shall then be asserted.

The Civil Code authorizes any person, for purposes useful to himself alone, or for the benefit of himself and others, to divert the waters of a stream, the rights of riparian proprietors *not being affected*. The claim of respondent is that, under the provisions of the Code, any person may divert all the waters of a stream from the lower lands, conduct them to a distant place beyond the water shed, and, whatever the additional loss by seepage and evaporation caused by a change of the channel, apply them either to his own purposes or sell them to others, the only conditions being that he shall appropriate them in the *manner* prescribed by the Code, and that they shall be used for an object beneficial to somebody. Civil Code, 1411.

It may be intimated that the court should avoid too narrow a view of the important question involved. It may be suggested that judges in this state should rise to the appreciation of the fact that the physical conditions here existing require an "appropriator" to be authorized to deprive, without indemnification, all the lower riparian proprietors, however numerous, on the course of an innavigable stream, of every natural advantage conferred on their lands by the running water. A "public policy" has been appealed to which has not found its expression in the statutes of the state, but rests apparently on the political maxim, "the greatest good to the greatest number," on the claim that, by permitting such deprivation of the enjoyment of the stream by the riparian proprietors, more persons, or a larger extent of territory, will be benefited by the waters. The proposition is simply that, by imperative necessity, the right to take or appropriate water should be held paramount to every other right with which it may come in contact.

But the policy of the state is not *created* by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws. The contest here is between persons who, as in every other litigation, may be said indirectly to represent other persons, or classes of persons, having interests like those of the respective parties, since the decision in this case may establish a rule which shall determine the rights of other persons holding positions, relatively to each other, like those of the plaintiffs and defendant herein. Even if the greater number whom it is *assumed* will be benefited by making the interests of non-riparian takers or appropriators paramount shall also be assumed to constitute "the public," while riparian proprietors, however numerous, shall be treated merely as individuals having interests adverse to the public, this consideration, if it should ever have weight with judicial tribunals, should have weight only in very doubtful cases. As was said by LEWIS, C. J., in *Vansickle v. Haines*:

"That the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by the law, and in sacrificing none, not even the most trivial, to further its own interests." 7 Nev. 259.

If the law is settled, we cannot override the established rule to secure some conjectual advantage to a greater number. If, however, we were permitted to do this, the inquiry would still remain whether the recognition of a doctrine of appropriation (such as is contended for by respondent) would secure the greatest good to the greatest number. Observe, if that be the true rule, the appropriator does not

necessarily act as the agent of the state, employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subject only to the trust that he shall employ it for some useful purpose. It would hardly be contended that while he continues to use it for a useful purpose, a statute would be valid which should take it from him, without indemnification, under a pretext of regulating the "common use" of the water more profitably, or of providing for its distribution so as to benefit a greater number of persons. He would have a vested right to the use of the water, although the riparian proprietors would have none. If, indeed, one who has appropriated the water of a stream since the adoption of the present constitution has appropriated it "for sale, rental, or distribution" to others, the rates he may charge consumers must be fixed by local authority. Const. art. 14, § 1. But if he shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property *in him*. Riparian lands are irrigated naturally by the waters percolating through the soil and dissolving its fertilizing properties. This is sufficiently apparent from the consequences which ordinarily follow from the continual cessation of the flow of a stream. If, in accordance with the law, such lands may be deprived of the natural irrigation, without compensation to the owners, we must so hold; but we fail to discover the principles of "public policy" which are of themselves of paramount authority, and demand that the law shall be so declared. In our opinion, it does not require a prophetic vision to anticipate that the adoption of the rule, so-called, of "appropriation," would result, in time, in a monopoly of all the waters of the state by comparatively few individuals, or combinations of individuals, controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those *from whom they had taken it away*, as well as to others. Whether the fact that the power of fixing rates would be in the supervisors, etc., would be a sufficient guaranty against overcharges would remain to be tested by experience. Whatever the rule laid down, a monopoly or concentration of the waters in a few hands may occur in the future. But surely it is not requiring too much to demand that the owners of lands shall be compensated for the natural advantages of which they are to be deprived. It is admitted that a single riparian proprietor would stand on the same footing as one not such. But the concession would still leave the rule in force: "First come, first served."

It has been assumed that there is no medium between the rule contended for and what *has been said to be* the rule of the common law, which requires that the stream shall flow "undiminished in quantity" past the lands of all the riparian proprietors, and it has sometimes been gravely argued that, unless the doctrine of appropriation

shall prevail, the owner of lands near the mouth of a stream may not only fail to use the waters himself, but will have power to refuse to permit any other person to employ them. We have already said that the right to the water of the riparian proprietor may be taken for a public use, on due compensation to such proprietor; and it will be noted (since the defendant is not a riparian proprietor, unless made such by the mere fact of its appropriation) that the exigencies of the present case do not imperatively demand that we shall here determine the respective rights of riparian owners as between themselves. But even if the defendant is to be treated as a riparian proprietor with reference to the specific tract in which is the head of its canal, we entertain no doubt, upon principles of the *common law* as applied to the conditions here existing, that each riparian proprietor is entitled to a reasonable use of the water for irrigation. This statement has its bearing on the alleged public policy which, it is claimed, should control when the alternative is presented between "appropriation" and the non-use for irrigation, or like purposes, by any person. What is a reasonable use by a riparian occupant—reference being had to the use required by the others—must depend upon the circumstances of each particular case. This cause was not tried on the theory that defendant was a riparian owner. There is no pretense that the water diverted was necessary for, or was used for, the reasonable irrigation of the specific tract at the head of defendant's canal.

Counsel do not seem to agree as to the nature and pervading force of the "public policy" relied on. While, on the one hand, it has been suggested that policy demands the recognition of the doctrine of "appropriation," so called, (a doctrine which would give to the prior appropriator the right to divert, without compensation, all the waters flowing to inferior riparian owners,) throughout the state, counsel, appearing as *amici curiæ*, urge that different public policies obtain in different portions of the state. In view of this assumed fact, it is said, it should be held that the streams in the more arid portions of California may be entirely diverted by the prior appropriator, as against those below, and that the common-law rights of riparian proprietors should prevail in the regions in which the climate more nearly resembles that of other states where the common-law rule is enforced. The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor, the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated. No precise line of separation between the regions so characterized is pointed out, and the attempted classification is itself somewhat uncertain and indefi-

nite. It would seem there could be no doubt that the law, *derived from the same sources*, is the same everywhere in California. Were the theory of counsel accepted, would the courts take judicial notice of the physical conditions, in an undefined district, which would compel the adoption of one rule rather than the other? or would the matter be submitted to the trial court or a jury upon evidence to be determined as a question of fact? If the theory were accepted, parties to a litigation would be subjected to one or another law, as it might be deemed by court or jury, in the particular case, that it was for the interest of the neighborhood (or large "region," as the case might be) that the rights of the parties should be settled by the one law or the other. Perhaps, too, the law with respect to appropriators and bank-owners on the same stream would vary with the changing seasons. And if the issue as to the applicability of one law or another were submitted as a question of fact, two different laws might obtain and determine the rights of parties in different suits, as the evidence adduced with respect to physical conditions of the "region" should bring home to the minds of the triers one conviction or another. Certainly, a judgment in a particular case (if the question would be one of fact) would not be binding upon all the residents of the region, nor determine what law prevailed therein. We can conceive of no "public policy" which should compel us to abandon the rights of the citizen to the whim or caprice, or to the deliberate and honest judgment, of the arbiter in each separate case. Whatever is the general law bearing on the subject, it is the same everywhere within the limits of the state. It is for the court to apply, or to direct a jury to apply, the appropriate rule to the facts proved by the evidence bearing upon the issues made by the pleadings; but neither court nor jury can say that it is expedient to declare that a law shall be operative in one portion of the state which differs from the law in other portions, or to decide that there is no general law bearing on the subject.

4. *By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use.*

We have been warned lest in approaching the subject we shall assume that, *in the very nature of things*, running waters are inseparably connected with the riparian lands. It may be conceded that if riparian owners have any right in the waters (or in the lands themselves) it is such as is created or recognized by the law of the land. It is at least equally true, however, that every inhabitant of a state or district does not possess a potential right, inherent in his habitation, to divert so much of the waters of a stream as he may have occasion to employ. The whole matter depends upon the law of the country, written or unwritten.

Counsel for respondent announce the proposition:

"The fundamental principle upon which all the laws of the former governments of this territory upon this subject [waters and their uses] were based will  
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be found to be that the flowing waters of the streams and rivers of the country *were dedicated to the common use of the inhabitants*, subject to that legislative control, which is the equivalent of the exercise of that legislative power which we know as the 'police power' of the state."

We understand this to mean that "the inhabitants" of the territory, or, at least, the occupants of lands in each valley or water-shed capable of irrigation from a stream flowing in it, had, under the Mexican law, a vested interest in the common use for irrigation and like purposes to which the waters were "dedicated," which could not be taken away by the legislative power; that the dedication continues to the present hour; that the state of California has no power to restrict the use to riparian proprietors; that the statute of 1850, adopting the common law "as the rule of decision," is not to be construed as an attempt so to restrict the use, and if it must be thus construed, it is invalid to that extent, since the power of the state is limited to the mere *regulation* of the common use. In support of the proposition above recited, counsel refer to *New Orleans v. U. S.*, 10 Pet. 662. In the year 1717 a charter was issued by the king of France to a corporation styled the Western Company, whereby were granted to the company the lands, coasts, harbors, and islands in Louisiana. Under its auspices the ground where the city of New Orleans now stands was selected as the place for the principal settlement of the province. In 1724 and 1728 maps of the town were made, on which a space on the margin of the Mississippi was designated as a "quay." This space was continually used for the purposes to which it was devoted. These, with other circumstances, were held proof of a dedication to the public, in *New Orleans v. U. S.* The case is in accord with established principles, both of the civil and common law.

It may be conceded that when, under the former government, property was *dedicated* to the public use, either by a private person or the nation, the people comprising the public and their successors acquired a vested interest of which they cannot arbitrarily be deprived, to the extent of the common use to which the property was dedicated. But it would seem to be difficult to derive the right to the exclusive use of the whole or portions of the waters of a stream from their dedication to the common use of all. We shall see that the laws of Mexico authorized the diversion of waters for the exclusive benefit of corporations and individuals, under some circumstances. The provisions of our Civil Code authorize such diversions for exclusive use. It cannot be successfully argued that laws authorizing such exclusive appropriations are less an infringement of the "common use" to which rivers were devoted than a law limiting the use of the waters to riparian proprietors.

And this leads to an inquiry as to the nature of the common use of running waters under the Mexican law. In the Institutes of Justinian it is declared concerning things: "They are the property of some one or no one,"—"vel in nostro patrimonio vel extra nostrum patrimonium."

"Some are, by natural right, common to all; some are public; some are of corporate bodies, [cities—*municipia*]; and some belong to no one. Many are the property of individuals, acquired in divers ways," etc. Liber 2, tit. 1. "The things which, by natural law, are common to all, are these: air, running water, [*aqua profluens*], the sea, and, as a consequence, the shores of the sea." Id. § 1. "*Flumina autem omnia et portus publica sunt.*" Id. § 2. The Roman law distinguished between "*res communes*" and "*res publicæ*." The sea was included among the former, the rivers among the latter. Halleck, Int. Law, 147, notes. All perennial rivers were public. Dig. 43, 12, 3. Such rivers were of the class of things "*publico usui destinata*," like ports and roads. Moyle, Ed. Inst., 184, note.

The same distinction is recognized by Spanish writers; "*bienes comunes*" being those which, not being as to property of any, pertain to all as to their use,—as the air, rain, water, the sea, and its beaches; "*bienes publicos*," those which, as to property, pertain to a people or nation, and, as to their use, to all the individuals of the territory, [or district,]—such as rivers, shores, ports, and public roads. Escriche. See, also, the word "*cosa*." In Febrero, Novisimo, *cosas comunes* are defined as those "*qui sirven a los hombres y demas vivientes, como el aire, el agua llovediza, el mar y sus riberas.*" T. 1, lib. 2, tit. 1. Both writers cite law 3, tit. 28, pt. 3. In Hall's version of the law referred to there are included in the things belonging as to property to none, and as to use to all living creatures, "air, rain, water, the sea, and its shores." Hall, Mex. Law, 447. This is probably a mistake of the printer. The words of the law are, *el ayre, e el mar e las aguas de la lluvia*." Lord DENMAN remarks that Fleta, enumerating "*res communes*," omits "*aqua profluens*." *Mason v. Hill*, 5 Barn. & Adol. 23. By the Mexican law the property in rivers pertained to the nation; the use, to the inhabitants. The nature of this use will be considered hereafter.

The modern doctrine as to the sea-shores, even in countries where the civil law prevails, seems to be that they belong to the state. *Pollard's Lessee v. Hagan*, 3 How. 212. It has been suggested that the claim of ownership by the English crown to the ocean beaches is the remnant of the broader claim once asserted to the narrow seas adjoining the British islands. Ang. Water-courses. But the modern doctrine which attaches to the sovereignty the property in the sea-shores seems to be derived from Celsus. Dig. 4, 3, 8, 3; Moyle, Inst. 183. By the Mexican law the shores of the sea include the space covered by the flux and reflux of the waters at their greatest altitude, whether in winter or summer. Escriche calls the "*playa*" "*la ribera del mar*," and remarks: "The laws of the Partidas place the '*playa*' among the common things which all men can use, but it cannot be intended to treat it as independent of the nation to which it may pertain." And, under the head "*Ribera*," he says: "The shores of the sea pertain as to property to the nation of whose territory they are a

part, and as to use to all," etc. It is unnecessary, however, here to declare whether by the Mexican law the ocean beaches were *proprietates nullius*, or pertained as to property to the nation.

Whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others. "*Communis omnium est harum rerum usus ad quem natura comparatae sunt, tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non leditur.*" The common use of rivers would seem to be such as all could enjoy who had access to them as rivers. Vinnius says: "*Unicuique licit in flumine publico navigare et piscari;*" and adds, with respect to running water generally: "*Aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*" Cited by Lord DENMAN in *Mason v. Hill*, 5 Barn. & Adol. 1. In *Mason v. Hill* the learned judge speaks of a distinction mentioned by the civilians between a river and its waters; the former being, as it were, a perpetual body, and under the dominion of those in whose territory it is contained; the latter continually changing, and incapable, "while it is there," of becoming the subject of property. He adds: "It seems that the Roman law considered running water not as a *bonum vacans*, in which any might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only."

The common use of the waters, it would seem, existed only while they continued to flow in, and constituted a portion of, the river; but under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals. The oceans, "*propter immensitatem,*" may be used to their fullest benefit "without any exclusive appropriation," and such appropriation is not necessary for the purposes of society, or of advantage to mankind. "Moreover, the use of the sea may be said to be matter of necessity to all those nations who have any part of their territories bounded by it; and as no nation can possibly assert that it is unable to enjoy the fullest use of the sea without the exclusion of others, so no nation can have any just ground for excluding others from an advantage which all may enjoy, together with equally full utility to each. This legal doctrine is thus admirably summed up by a German civilian: 'The great sea is a thing the use of which is inexhaustible, consequently, as no one can acquire the dominion of things the utility of which is unbounded and inexhaustible, no one (even were it possible in fact) can subject the great sea to his dominion without violating natural law; and the same must be understood of several nations, who cannot, for the same reasons, divide the dominion of the great

seas among them. Consequently no nation can, without infringement of natural law, subject to its dominion the great sea." Bowyer, Comm. Mod. Civil Law, 64; citing the Pandects, Grotius, Pufendorf, Bynkershoek, Wolf, Just. Gent.

The same writer says:

"Both Grotius and Pufendorf deduce the appropriation of things which must probably have been common to all men, from the very constitution and organic rules and necessities of the social state, as well as from the objects for the furtherance of which that state is intended. But it follows from the same principles that those things, the exclusive appropriation of which, either to a portion of mankind or to certain individuals and purposes, is unnecessary for the objects of the social state, (that is, for the furtherance of the welfare of mankind,) must remain by natural law common to all men. Thus air and light cannot be brought under the power of any one person. Upon these principles, running waters are held by the Roman *juris consulti* to be common to all men. But it also follows that this decision does not apply to waters the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose; as water included in a pipe or other vessel for certain uses. The common right to the use of running water, therefore, applies only to those cases where the quantity of water is so great that its entire exclusive appropriation is not necessary, having regard to the general objects of the institution of property. Gro. Droit de la Guerre, Puf. Droit de la Nature." Bowyer, Comm. 61.

"Thus, running water is capable, indeed, of a qualified appropriation as property, but subject to a common right by natural law, where it is capable of being fully enjoyed without exclusive possession." Id. 62.

Vinnius, in his commentary on the institution above referred to, says those things are common which by nature are devoted to the use of all, and which in "*nullius adhuc ditionem aut dominium pervenerunt*;" which seems to imply that some things hitherto common may become the property of an individual. And this is true with reference to things the ultimate property of which is in the state, the use of which is common until the exigencies of the social state require that they shall be subject to the exclusive use of individuals. Inasmuch, however, as the property is in the nation, such exclusive use can be acquired only with the nation's consent.

By the Mexican Civil Code of 1870 it is provided: "The property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of 'property' in waters is subject to what is provided in the following articles." Article 1066. In Guerra's El Código Civil, in Forma Didáctica, the word "private" is inserted after the word "property," so as to make the last sentence of the article read: "*El ejercicio de la propiedad privada de las aguas, esta sujeto*," etc. If, as is suggested by counsel, the presumption is that the provisions of the Code are declaratory of the pre-existing law, the right which could be acquired under the laws to the separate use of the portions of a stream constituted an exclusive usufruct of the nature of private property, which did not

and could not co-exist with a common use of such waters by all. As we have seen, running water is capable of appropriation as private property, independent of any common use, where the quantity of water is so small as to be incapable of being fully enjoyed without exclusive possession. The exclusive appropriation is put in opposition to the common use. Bowyer, Comm. *supra*. Article 789 of the Civil Code defines private property: "All things the dominion of which pertain legally to private persons, and those which cannot be used without the consent of the owner, are private property."

The Mexican government prohibited any diversion or obstruction of the waters of a river by riparian proprietors or others, which should interfere with navigation. Escribiche says: "*No puede ningun particular hacer en los rios ni en sus riberas casa o otro edificio que embarace la navegacion, \* \* \* porque la utilidad de todos los hombres no se ha de impedir por la de uno solo,*" etc. It has been said that rivers may be used for purposes of navigation, not only by the denizens of the land where they are found, but by strangers, unless some municipal ordinance, law, or custom confines their use to a certain class of persons. Febrero. This, of course, implies that the sovereign may limit the right of navigation to particular classes. "Notwithstanding the banks of rivers are as to dominion or ownership of those whose lands adjoin, all navigators may use them, by tying their vessels to the trees growing there, landing their merchandise thereon," etc. Gen. Halleck says that, by the Roman law, the right to navigate rivers carried with it the right to moor ships to the banks. Int. Law, *supra*.

Thus, it was the policy of Mexico to foster and protect navigation. The rivers naturally adapted to the passage of water-craft were devoted to the common use for purposes of navigation. It would seem to be in the power of the sovereign (except so far as the power is limited by the constitution of government) to authorize such diversions as shall interfere with navigation. It was never doubted that an act of parliament would operate to extinguish any public right to passage. Woolr. Waters, 289. While, however, a river remained a navigable river, the navigation was, by the civil law, common to all, unless the privilege was limited to a class. Interference with the appropriate common use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them continued only while the waters legally flowed in their natural channel, and the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting

the diversion of waters from innavigable rivers by those not riparian proprietors upon such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had *power* to do this, even if the consequence should be the entire deprivation of the common use.

It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for *grants* to such persons, but were themselves a recognition of a right in all to a use of the waters. But a system which provided for the mode of acquisition of private, separate, and exclusive rights, by individuals or corporations, cannot be said to be merely in regulation of a common use. The common right of passage over a public road, or of navigation of a river, may be regulated by laws which facilitate the general enjoyment of the common use. But under pretense of exercising the common use, where it exists, no one can interfere with its enjoyment by others. Article 803 of the Code of 1870—except, perhaps, with reference to some of the penalties prescribed declaratory of the pre-existing law—provides: "Those who obstruct the common use of public property are subject to the established penalties, to pay all damage and injury caused, and to suffer the loss of the works they shall have made." Those who appropriated and diverted the waters of an innavigable river in accordance with the laws, obstructed *pro tanto* its common use. Nevertheless they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use.

No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or *municipality* to deprive him of it without indemnification. It may be conceded that one who had acquired the right to the exclusive use of a portion of the waters of a river under the Mexican *regime* could not be deprived of his right by a law of California. But can it be said that all the inhabitants of the state, or of a valley through which a stream flows, have such a vested right in the use of the waters which some of them (on performance of the conditions prescribed by Mexican law) might have appropriated, but never did appropriate?—this on the theory that the waters had been dedicated to the common use of all? It would be a dedication never accepted by those to whom it was made, and a dedication to a common use which could never be enjoyed in common.

Those who had not appropriated waters in the mode prescribed had no right or property in the water or its use of which they would be deprived by subsequent legislation conferring the use of the waters on riparian proprietors alone; and it would seem very clear that those who actually appropriated water, in compliance with the conditions prescribed, acquired a proprietary interest of which they could not be deprived,—at least while they continued its use,—except on sufficient indemnification. It cannot be presumed that, under a constitution which declares, in as distinct terms as does our own, that private property shall not be taken, except on due compensation, the legislature attempted to authorize an arbitrary deprivation of property rights acquired by expenditures invited by the laws themselves. At common law, if a navigable river should happen to change its course the right of navigation extends wheresoever the channel should run, (Woolr. 288;) and by the Civil Code of 1870 rivers and their beds [*alveos*] are declared to be public property of common use, (section 802.) But the property of the nation in the space subjacent to the river ceases when that space ceases to be the bed. "When a river varies its course, the owners of the fields or estates newly covered by the waters lose the space which the river occupies, and the riparian proprietor of the abandoned *bed* acquires the part in front of his land to the middle of the bed," etc. Civil Code 1870, art. 897. See, also, Escriche, "*Aguas*" and "*Rio*." "The islands which are formed in rivers not navigable or floatable belong to the proprietors of both banks proportionably with the extension of the front of each estate along the river, drawing a dividing line through the middle of the bed." Article 900. Thus, the property of the nation is in the *river* and its bed, while it is the bed of the river; the common use continues while the water is the water of a river. But a private right to the exclusive use of the waters could be acquired, under the Mexican law, by *prescription*, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights.

Conceding the provisions of the Civil Codes of 1870 and 1884 to be declaratory of the law as it existed when California was ceded to the United States, they do not confer nor recognize any inherent vested right, enforceable in the courts, in others than riparian proprietors, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriate waters in the manner and on the conditions prescribed by the laws. It may be that the Mexican system implies a recognition of an imperfect obligation or moral duty on the part of the government to provide for the distribution of the waters in such manner as to encourage the settlement of the country, develop manufactures, and benefit agriculture. In this view, it would seem that the laws were inspired with a liberal spirit, and were well calculated to advance those objects.

By the Codes the owner of an estate in which there is a natural

spring may use or dispose of its waters, subject only to condemnation for public use on compensation to the owner. Article 1056, Code 1870. Such was the law previously,—the spring was his as part of his land. Escribiche, "*Aguas*." By article 1066 of the same Code the property of the state does not prejudice the rights over waters acquired by individuals or corporations, "by *legitimate title*, according to what is established by the *special laws*." That article declares that the exercise of private property in waters is subject to what is provided in articles 1067, 1068, and 1069. The first two of these prohibit any diversion which shall interfere with navigation. Article 1069 declares:

"The owner [*el propietario*] of water, *whatever may be his title*, cannot impede the use [*el abasto*] that may be necessary for the *persons or cattle* of a possession or rural estate, nor oppose the construction of indispensable works to satisfy this necessity in the manner least injurious to the owner, but he shall have a right to indemnification," [*"por los perjuicios que por tal motivo se le causen."* Guerra,] "save that the inhabitants shall have acquired the use of the water by prescription, or other legal title."

Article 966 of the Code of 1884 is a substitute for articles 1067, 1068, and 1069 of the Code of 1870. In that article it is said: "He who, in conformity with the preceding article, [he who has acquired a private property to waters, by legitimate title, according to what is established in the *special laws*,] may be using the waters of a river, cannot impede," etc. Article 1073 of the Code of 1870 is:

"Every one who wishes to use the water of which he can dispose has a right to cause it to pass through intermediate grounds, with the obligation of indemnifying their owners, as well also as those who own the lower lands on or through which the waters may filter or fall,"— [*"Así como tambien a los de las predias inferiores sobre que se filtren o caigan las aguas."*]

We understand the last class to be those whose lands are injured by the water after it has been diverted. The article treats of a legal servitude which, without agreement or prescription, but simply as a consequence of the respective positions of the estates, (article 1056,) is imposed on lands situated between the river and the tract or place to which the water is conducted. It does not purport to give the absolute right, without regard to the conditions provided by laws, or administrative regulations under the laws, to divert waters of a river by one separated from it by other lands, nor define the mode by which rights thus to divert may be gained.

The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing to the common lands, and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo; but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the *pobladores*, the irrigable lands, and the mills and manufactories, within the general limits,

was vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers.

A translation of the plan of Pitic is annexed to Dwinelle's Colonial History of San Francisco, *addendum* No. 7. The original is not before us. Whether the plan of Pitic is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789, (as is claimed by counsel,) it may be conceded the provisions therein contained were, in substance, those having force in the pueblos established in California while it was part of the territory of Mexico. The plan authorized a commissioner, after the measurement of the exterior lines of the four leagues, to set apart the *ejidos*, *proprios*, etc., and to distribute the remaining lands to the settlers in separate tracts. The nineteenth and twentieth sections of the plan read:

"Sec. 19. The advantage of irrigation being the principal means of fertilizing the lands, and the most conducive to the increase of the settlement, the commissioners shall take particular care to distribute the waters so that all the land that may be irrigable might partake of them, especially at the seasons of spring and summer, when they are most necessary to the cultivated land in order to insure the crops, for which purpose, availing himself of skillful or intelligent persons, he shall divide the territory into districts [*partidos*] or hereditaments, marking out to each one a trench or ditch, starting from the main source, with the quantity of water which might be regulated as sufficient for its irrigation, at the said periods and at the other seasons of the year that they may need them; by which means each settler shall know the trench or ditch by which his hereditament shall be irrigated, and that he cannot and shall not have the power to take the water of another, nor in a greater quantity than that which may fall to his share; for which purpose, and that it may not increase in injury to the owners situated on the land beyond or still lower, it shall be proper for the trenches or partitions to be constructed in the main ditch made of lime and stone, at the cost of the settlers themselves.

"Sec. 20. In order that these [the settlers] might enjoy with equity and justice the benefit of the waters in proportion to the need of their respective crops, there shall be named annually by the ayuntamiento one alcalde [or mandador] for each trench, to whose charge shall fall the care of distributing them in the estates [*heredades*] comprised in the '*partido*' or hereditament, which shall be irrigated by them in proportion to their need for this benefit, designating, by a list which he shall make out, the hours of day and night at which each owner [*heredado*] shall irrigate his lands sown with grain; and, in order that by the carelessness or indolence of the owners [*duenos*] those [the lands] that may need them shall not remain without irrigation, nor the crops be lost, whereby, independent of the private injury, may also result that of the public and community, produced by the want of provisions and supplies, it shall also come within the duty of the alcalde or mandador for each trench to have a servant [*peon*] or day laborer, knowing the hour of the day or night designated for the irrigation of each tract of land or corn-field, who, in default of its owner, shall take care to irrigate it; the just price of his labor, which shall be caused to be paid to him by the owner of the land or estate [*heredad*] irrigated, to be thereafter regulated by the commissioner or by the justice."

In *Hart v. Burnett*, 15 Cal. 530, it was held that the pueblo had a "certain right or title" to the lands within its general limits, notwithstanding the fact that the Mexican government retained the power

to make grants within those limits; that the pueblo authorities were more than mere agents of the government to dispose of the lands as public lands, but the pueblo itself had a vested interest in the lands, and that the portions of such lands not set aside or dedicated to common uses, or for special purposes, could be gran'ed in lots by the municipal officers to private persons, in full ownership; that the city of San Francisco succeeded to the right or title of the pueblo, and that the municipal lands to which it thus succeeded were held in trust for the public use of the city, and were not subject to seizure and sale under execution issued on a judgment against the city; that the property and trusts were public and municipal in their nature, were within the supervision and control of the state sovereignty, and the federal government had no such supervision or control; that the act of the state legislature of March, 1858, confirming the so-called "Van Ness Ordinance," was a legal and proper exercise of this sovereign power.

By analogy, and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or "a certain right or title" in their use, in trust, to be distributed to the common lands, and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. It may be conceded that such authorities were not authorized to make concessions to individuals of the perpetual and exclusive use of portions of the waters, without reference to the needs of the other inhabitants, or that such concessions would be an abuse of the trust. But they had a species of right or title in the waters and their use, subject to the public trust of continuously distributing the use in just proportion. The trust is within the supervision and control of the state. Thus, the legislature has provided for the mode and manner in which shall be exercised the trust of distributing the waters by the city, the successor of the pueblo of *Los Angeles*. The inhabitants of the former pueblo, who were using water when this territory was transferred to the United States, had not acquired a vested right to any particular quantity of water; and the occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water, and at such times, as accords with the laws regulating the public and municipal trust. Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and, by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while, as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred.

Escribhe deduces from law 8, tit. 28, and law 18, tit. 32, *partida* 3, and from writers basing their opinion on those laws and the Roman laws, that any inhabitant of a pueblo through which passed an innavigable river might extract a part of its waters, and construct an

*acequia*, in order to irrigate his land, or to run his mill, provided he could do so "without prejudice to the common use or destiny which the pueblo shall have given the waters; with the understanding that if the *acequia* shall cross the land of another, or the crown lands, or the land common to the inhabitants of the pueblo, a license from the private owner, or from the king, or from the town council, is indispensable." ["*Bajo el supuesto de que si la acèquia hubiese de atravesar suelo ajeno, realengo o concejil,*" etc.] Escriche, "*Acequia.*"

Thus, by virtue of the laws, each person having land within the pueblos was permitted to conduct water to it, (obtaining the consent of the owners of the lands between his and the river,) provided, by so doing, he did not violate the municipal ordinances giving destination or distributive use to the waters. By its terms this permission was accorded only to the inhabitants of the pueblo, and could be acted on only in such manner as should not interfere with municipal ordinances.

After speaking of springs rising in a man's land, which are his property, Escriche says:

"Waters belong to the public which are not and cannot [thus?] be private property. Such are the waters of rivers which, by themselves, or by accession with others, pursue their course to the ocean. They may be navigable or not navigable. If navigable, no one can avail himself of the waters so as to embarrass or hinder navigation. If not navigable, the owners of the lands through which they pass may use the waters thereof for the utility of their farms or industry, *without prejudice to the common use or destiny which the pueblos on their course shall have given them*, and with the modifications provided in the laws, orders, and, decrees which are spoken of under the word '*acequia.*' [*'Aguas,' de las aguas que pertenecen al publico.*]"

And in treating of "waters which pass by the side or through an estate," the same writer says:

"The use of waters of which no one can avail himself without a license from the authority is to be regulated [*debe arreglarse*] by municipal ordinances, or by the usages and customs of the country, [*los usos y costumbres*,—general and long-continued practices, which have acquired the force of law:] but, in default of ordinances and customs, equity and the interests of agriculture dictate the following rules."

He proceeds:

"The waters of fountains and springs are the property of the owners of the lands on which they rise; \* \* \* but as they go out from thence they become running waters, [*agua profluens*,] and pertain like common things [*cosas comunes*] to the first who occupies them, so far as he has need of them. The first who can occupy them are the owners of the estates which they bathe or cross."

He then treats of the rights of riparian proprietors to the use of the waters as between themselves.

From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and, *semble*, that the pueblos had a preference

or prior right to consume the waters, even as against an upper riparian proprietor. The common use here spoken of is the use for the benefit of the community or inhabitants of the pueblo, whose interests as a whole were to be considered in the distribution of the waters by the officers of the pueblo. Plan of Pitic, § 20. It is not necessary here to decide that the pueblos had the preference above suggested; nor is it necessary here to speak of the relative rights of two or more municipalities on the same stream. In such case (whatever the standard by which were to be determined the relative rights of the pueblos respectively as to quantity of water) it would seem clear that the municipal regulations of each, with respect to the application and distribution of water, would be of force only within its own boundaries. But there could be no municipal ordinance of a pueblo regulating or distributing the waters of a stream among its inhabitants, or other persons, until a pueblo was established. We take notice that no pueblo existed on the water-course (if any there be) which is the subject of the present controversy. No portion of its waters were therefore dedicated or devoted to the use of the inhabitants of a pueblo by virtue of the laws giving to pueblos the power of distributing waters.

Turning now to the "laws, orders, and decrees," under the word "*Acequia*," to which we are referred by Escriche. In the instructions of May 15, 1788, to corregidores (magistrates with a species of supervision over matters political and economical in pueblos and districts) and superior (appointed) *alcaldos*, they were directed, in order to promote the utility of the fields by the use of all the water that could be applied for their benefit, to adopt measures for the construction of *acequias* from the rivers, draining them in the parts most convenient, *without prejudice to their course and to the lower districts*, and taking care also to discover subterranean waters in order to use them, "as well as for flour-mills, fulling-mills, and other necessary and convenient machinery for grinding," etc. Nov. Recopilacion, T. 3, tit. 11, lib. 7, law 27, § 48; Hall, Mex. Law, § 1402. By the royal decree of the thirty-first of August, 1819, favors were extended to *ayuntamientos*, communities, companies, and individuals who, "with the previous corresponding permission of the government," should construct at their own cost ditches or canals for new irrigations, taking water from rivers which afford *an abundant supply*, or carry much water, (*caudalosos*), collecting at one place the waters of the *arroyos* or springs, or conducting them from the bosom of a high mountain, etc. The favors extended by the decree are enumerated by Escriche, and consisted in the main of remission of *tithes*, *first fruits*, etc. It is doubtful whether this decree was in force when California passed from under the sway of the Mexican rule. But, if so, Escriche adds: "Notwithstanding what has been said, no individual or corporation can withdraw from their source, or on their course, the waters of springs or rivers that from ancient times have irrigated other lands lower down, which cannot be despoiled," etc.

The last statement is based by the author upon the royal order of 1834, which, as is suggested, was never operative in Mexico. Upon principles recognized by the Mexican law, however, no one could be deprived of a right to the use acquired by *prescription* to waters actually employed by him, and it would appear, also, by the Mexican Code, no owner of water, "whatever his title," can entirely deprive of water a lower estate. Besides, the decree permitted the construction of ditches for "new irrigations," and speaks of rivers carrying great quantities of water. We are not prepared to say but that even where the *common law* prevails, provision may be made for the storing and distribution of waters, the result of extraordinary floods caused by the melting of the snows, or long-continued and heavy rains in the mountains or near the source of a river, since such an extraordinary freshet would not be the ordinary flow of the stream. However this may be, water could not be diverted, under the decree referred to, by an *ayuntamiento*, community, company, or individual, not a riparian proprietor, without "the previous corresponding permission of the government."

Thus, the waters of innavigable rivers, while they continued such, were subject to the common use of all who could legally gain access to them for purposes necessary to the support of life, but the Mexican government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations, upon such terms and conditions, and with such limitations, as it saw fit to establish by law. The respondent here is not the successor in interest of an individual or corporation which acquired a property in the exclusive use of waters by compliance with the conditions prescribed by the laws of Mexico, or in accordance with municipal ordinances or regulations, or under any custom of the country. No city or pueblo existed on the alleged stream, and at the trial hereof no evidence was given of any special or general custom with respect to the particular stream, or with respect to all rivers in California. No general custom existed. Moreover, if it had ever existed, it would have continued only until abrogated by legislation.

It has sometimes been claimed that, by the modern civil law, the proprietor of land in which is the source of a stream may capture and absolutely control the waters, even after they have flowed beyond his boundaries in a natural stream. But Lord KINGSDOWN, in *Miner v. Gilmour*, 12 Moore, P. C. 131, said it did not appear that, as to riparian rights, any material distinction exists between the French law (prior to the Code Napoleon) and the English law. Sir JAMES COLVILLE refused to admit that, by the Dutch-Roman law, which governs in the Cape of Good Hope colony, the riparian right of a lower proprietor would not attach upon water which followed, in a known and definite channel, beyond the boundaries of the land within which its fountain arose. *Van Breda v. Silberbaur*, L. R. 3 P. C. 94.

In a very late case before the privy council, on appeal from the supreme court of the Cape of Good Hope, it was said to be *probable* that, by the Dutch-Roman law, the dominion of the owner of the source of a stream was subject to the rights which the English law recognizes in riparian proprietors to water flowing in a known and definite channel. *Commissioners of Hoek v. Hugo*, L. R. 10 App. 345.

5. *Upon the admission of California into the Union this state became vested with all the rights, sovereignty, and jurisdiction in and over navigable waters, and the soils under them, which were possessed by the original states after the adoption of the constitution of the United States.*

*Since the admission of California into the Union the public lands of the United States (except such as have been reserved or purchased for forts, navy-yards, public buildings, etc.) are held as are the lands of private persons, except that they cannot be taxed by the state, nor can the primary disposition of them be interfered with.*

Between the transfer of California to the United States, by the treaty of Guadalupe Hidalgo, and the admission of this state into the Union, no territorial government was here established. The purely municipal law of Mexico continued in force within this territory until modified or entirely changed by appropriate authority. By the treaty the public property of Mexico passed to the United States. It would seem that the latter accepted the cession of the property and sovereign rights in trust, (arising out of the very nature of our government,) to hold for the state or states which might be subsequently formed out of the territory. Whether so or not, California was admitted into the Union "upon an equal footing" with the original 13 states, and from that date she became seized of all the rights of sovereignty, jurisdiction, and eminent domain which those states possessed. When the revolution took place the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, subject only to the rights since surrendered by the constitution to the general government. *Martin v. Waddell*, 16 Pet. 410. The navigable waters, and the soils under them, were not granted to the United States by any of the original states, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. *Pollard's Lessee v. Hagan*, 3 How. 212. The lands of the United States (not reserved or purchased for fortifications, etc.) are held, since the admission of the state into the Union, as are held the lands of private persons, with the exception that they are not taxable, by reason of the contract to that effect. Of course the state cannot interfere with the primary disposition of such lands by their owners. September 9, 1850, the act of congress was approved admitting the state of California into the Union "on an equal footing with the original states in all respects whatever," with the conditions that the state should

never interfere with the primary disposal of the public lands within its limits, nor tax them, and that the navigable rivers should be public highways as to citizens of all the states. 9 St. at Large, 453.

6. *Since, if not before, the admission of California into the Union, the United States has been the owner of all innavigable streams on the public lands of the United States within our borders, and of their banks and beds.*

*A grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title.*

The original states only retained property in the navigable rivers, (subject to their free navigation by the citizens of all the states,) and the subjacent soils, because, by the common law, which prevailed in those states, innavigable streams were private, and their beds the property of riparian proprietors. By the Mexican law, however, innavigable streams were public property. It might be claimed that, as this property of the Mexican nation in non-navigable rivers and their beds was an incident to the sovereignty, it became vested in the state of California when the state was admitted into the Union. If this were admitted, it would follow that the United States has had no property in innavigable streams, their beds, and waters, and all attempts to deraign a title from the United States to waters appropriated on public lands, under the act of congress of 1866, or otherwise, must fail.

It may be maintained, at least plausibly, that the admission of California into the Union "on an equal footing with the original states" of itself operated an immediate transfer of the property in the innavigable rivers to the federal government, so that the property of the state was momentary. However this may be, on the thirteenth of April, 1850, the legislature of California had passed an act "adopting the common law," which reads: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." St. 1850, p. 219. The validity of the acts of the first legislature of California, or of rights acquired under them even prior to the admission of the state, has never been questioned. Certainly, when constitutional, those acts became valid, and in operation for every purpose, from the date of the admission of the state into the Union.

It is urged that the statute quoted was designed and intended simply to furnish a *rule of decision* for the courts as to rights vested under other laws. We have endeavored to show that during the Mexican rule "all the inhabitants" of the territory did not acquire a vested right to the use of all the waters by virtue of their dedication to common use. If such right had vested, the peculiar language of the

statute would not have affected the question. If there is any ambiguity arising out of the use of the words "rule of decision" in the body of the act, we can refer to its title,—“An act adopting the common law.” And reading the act,—“the common law of England is hereby adopted,” etc.,—the act did not and could not operate to divest property rights previously acquired by private persons, nor any right of common use fixed by previous dedication. But while vested right could not be taken away, yet if the innavigable rivers and their beds belong to the state when admitted into the Union, the state could grant or surrender them to the riparian proprietors, of whom the United States was one. Giving full force to the proposition that a grant by the state should be construed more strongly against the grantee, we think, in view of the purpose of the act, (to adopt the appropriate rules of the common law as determinative rules when not in conflict with the constitutions and statutes,) and of the subsequent judicial history of the state, the act of April 13, 1850, should now be held to have operated (at least from the admission into the Union) a transfer or surrender, to all riparian proprietors, of the property of the state, if any she had, in innavigable streams, and the soils below them.

It has often been held by this court and its predecessors that a grant of a tract of land bounded by a river or creek not navigable, conveys the land to the thread of the stream; and from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.

If the United States since the treaty with Mexico has been the owner of the innavigable streams and their beds, (in trust for the state, or absolutely,) or has been the owner thereof as a consequence of the act admitting the state into the Union, or of the state act of 1850, or as a consequence of both those statutes taken together, the same is true as to other riparian proprietors; at least since the date of the

first-named act. They have been recognized as such owners by our courts. Prior and subsequent to the enactments of the Civil Code with respect to appropriations of water, the rights to the use of water by private riparian proprietors, as between themselves, have repeatedly been judicially determined by reference to the common-law rules on the subject, which, as is said by counsel, differ somewhat from those of the Mexican law. And if the United States since the date of the admission of the state has been the owner of the innavigable streams on its lands, and of the subjacent soils, grants of its lands must be held to carry with them the appropriate common-law use of the waters of the innavigable streams thereon, except where the flowing waters have been reserved from the grant. To hold otherwise would be to hold, not only that the lands of the United States are not taxable, and that the primary disposal of them is beyond state interference, but that the United States, as a riparian owner within the state, has other and different rights than other riparian owners, including its own grantees.

The government of the United States has the absolute and perfect title to its lands. *U. S. v. Gear*, 3 How. 120; *Jourdan v. Barrett*, 4 How. 185; *U. S. v. Hughes*, 11 How. 568; *Irvine v. Marshall*, 20 How. 561; *Bagnell v. Broderick*, 13 Pet. 450; *U. S. v. Gratiot*, 14 Pet. 526. Unless, therefore, running waters are reserved, they pass by grant or patent of the United States. It was so held in *Vansickle v. Haines*, *supra*. The supreme court of Nevada cite *Cook v. Foster*, 2 Gilman, 652, *Wilcoron v. McGhee*, 12 Ill. 381, and *Colvin v. Burnet*, 2 Hill, 620; and quote with approval the language of Mr. Angell, who says:

"The only mode by which a right of property in a water-course above tide-water can be withheld from a person who receives a grant of the land is by a reservation directly expressed or clearly implied to such effect. If the intention of the grantor is not to convey any interest in the water, he can exclude it by the insertion in the instrument of conveyance of proper words for the purpose of doing so; but in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." 7 Nev. 266.

Whatever may be the weight, as authority, of *Vansickle v. Haines* in other respects, the statement that the grantee or patentee acquires from the United States—the absolute and unqualified owner of the public lands—common-law rights in the waters flowing through the land granted (except where the waters, or a portion of them, are reserved) has never been disputed.

7. *The state of California became the owner of the swamp lands, described in the complaint herein, on the twenty-eighth day of September, 1850.*

The state of California having been admitted into the Union on the ninth day of September, 1850, on the twenty-eighth of the same September the congress passed an act "to enable the state of Arkansas and other states to reclaim the swamp and overflowed lands within their limits," which reads:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that, to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, *and the same are hereby*, granted to said state.

"Sec. 2. That it shall be the duty of the secretary of the interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state of Arkansas, and, at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee-simple to said lands shall vest in the said state of Arkansas, subject to the disposal of the legislature thereof: provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. That in making out a list and plats of the land aforesaid all legal subdivisions the greater part of which is 'wet and unfit for cultivation' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." 9 St. at Large, 519.

The lands claimed by the plaintiffs herein are admittedly swamp and overflowed, and no point was made by defendant that the lands had not been duly listed to the state prior to the certificates of purchase offered in evidence. Even if it had been made to appear that the lands had not been listed, the fact that they are swamp and overflowed would have shown that the state acquired a present vested right in them as of the date of the act of congress of September 28, 1850. *Railroad Co. v. Smith*, 9 Wall. 95. It is true that case turned in part on the language of the grant to the railroad company, which reserved lands "previously sold or disposed of." See *Railroad Co. v. Fremont Co.*, 9 Wall. 89. But the case clearly recognizes the act of 1850 as a grant to the state *in præsenti* of the lands which should subsequently be listed as swamp and overflowed by the secretary of the interior, or which should be proved to be such.

In the subsequent case (*French v. Fyan*, 93 U. S. 173) it was expressly said that nothing was decided in conflict with *Railroad Co. v. Smith*; the supreme court saying that in the opinion in the last-named case there is the strongest implication that if the secretary had made "an adverse decision" the evidence that the land there in controversy was in fact swamp and overflowed should have been rejected. In *French v. Fyan* it was held that the determination of the secretary that certain land was swamp and overflowed, and the patent issued thereon, were conclusive of the fact, and that the opposing party could not be permitted to prove that the land was *not* swamp land. Further, that the patent—the evidence that the land described in it had been identified as swamp and overflowed—related back and

gave certainty to the title of the date of the grant. The supreme court of the United States said: "This court has decided more than once that the swamp-land act was a grant *in presenti*, by which the title to those lands passed at once to the state in which they lay." The certificate or listing of the secretary, like the formal patent, relates back to the date of the act granting the lands. And so when the character of the land appears from the evidence identifying it as swamp and overflowed, it is established that the title to the particular land was vested in the state September 28, 1850, the date of the act granting all the swamp and overflowed lands. But such evidence that the land is swamp and overflowed is admissible in ejectment *only* where the secretary of the interior has failed to act, and is not admissible to overcome the effect of a patent issued to a settler under the pre-emption laws. *Ehrhardt v. Hogaboom*, 115 U. S. 67; S. C. 5 Sup. Ct. Rep. 1157. The state, then, had the title to the lands described in the complaint herein from the date of the act referred to until the sale of the same to the plaintiffs or their assignors.

NOTE. We have deemed it unnecessary to consider (under a separate head) the suggestion, either that there cannot be a water-course through swamp land, or that the defendant was empowered to drain the plaintiffs' lands for them, and, in doing so, to divert a flowing stream from the lands of plaintiffs, and from all the lands lying on the stream above or below the plaintiffs' lands. The state took the swamp lands with the political obligation to reclaim them after they were sold. It may be doubted whether the implied promise on the part of the state to apply the proceeds of sales of such lands exclusively to their reclamation was legally a *condition subsequent*, the failure to perform which would authorize a forfeiture of the grant. That, however, would be a question between the United States and the state,—a controversy in which the defendant here would have no interest. The state's grantee of swamp lands takes the full title, subject to the power of the state to reclaim the land, and for that object to impose and collect assessments upon it; subject, also, (perhaps,) to a forfeiture of his own and the state's title, in a proceeding inaugurated by the United States, if the land should not be reclaimed by the state. It may be added there are very grave doubts whether, upon a fair interpretation of the state statutes providing for reclamation, the barring of the flow of a regular and defined stream from the lands below, not swamp, is contemplated, or whether the state would have power, by any statute, to authorize such a proceeding. The statute seems to have in view levees along the sides of water-courses, and not across them.

8. *It has never been held by the supreme court of the United States, or by the supreme court of this state, that an appropriation of water on the public lands of the United States (made after the act of congress of July 26, 1866, or the amendatory act of 1870) gave to the appropriator the right to the water appropriated as against a grantee of ripa-*

*rian lands, under a grant made or issued prior to the act of 1866, except in a case where the water so subsequently appropriated was reserved by the terms of such grant.*

Since, as before, September 28, 1850, the United States has been the owner of lands in California, with power to dispose of the same in such manner, and on such terms and conditions, (not interfering with vested rights derived from the United States,) as it deemed proper. But neither the legislation of congress with respect to the disposition of the public lands, nor its apparent acquiescence in the appropriation by individuals of waters thereon, *subsequent* to the act of September, 1850, granting the swamp lands to the state, can affect the title of the state to lands and waters granted by that act. Neither the supreme court of the United States, nor the supreme court of California, has ever held in opposition to this view.

In *Vansickle v. Haines* the plaintiff had diverted one-fourth of the water of Daggett creek in the year 1857. He made the diversion at a point then on the public land, but which, in 1864, was patented by the United States to the defendant, Haines. In 1865 Vansickle obtained a patent for his own land, where he used the water. In 1867 Haines constructed a wood flume on his land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. The supreme court of Nevada held that the plaintiff, by his appropriation of water *prior* to the date of defendant's patent, acquired no right which could affect that grant; and that while the act of congress of July, 1866, protected those who at that time were diverting waters from its natural channels on the public lands; and while all patents issued or titles acquired from the United States since that date are obtained subject to the rights of water by appropriation existing at that time,—yet, with respect to patents for riparian lands issued *before the act of congress*, the patentee had already acquired the right to the flow of the water, with which congress could not interfere.

In *Broder v. Water Co.*, 101 U. S. 274, it appeared: In the year 1853 the defendant completed a canal, through which it had continuously conducted waters and distributed them for mining, agricultural, and other uses; that a portion of the land through which the canal ran was included in the land granted to the Pacific Railroad (under whom plaintiff claimed) by the act of July 2, 1864; that the plaintiff also claimed as a pre-emptor, the inception of his claim as such being a declaratory statement filed August 6, 1866. The court held that the plaintiff was not entitled to have the canal running through his land abated as a nuisance by reason of his pre-emption right, because previous to the initiation of proceedings to secure pre-emption, on the twenty-sixth of July, 1866, (14 St. at Large, 251,) congress had enacted a statute, the ninth section of which contained the declaration "that wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other

purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed." The court also held that the plaintiff was not entitled to relief under his deraignment of title from the railroad company, because the grant to the company of July 2, 1864, contained the following reservation:

"Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist."

In the opinion of the court the section of the act of 1866 above quoted "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one," and that the claim of the defendant to the right of way was such a "lawful claim" as was unaffected by the grant to the railroad company made before the act of 1866 was passed.

*Broder v. Water Co.* may appear to be in conflict with *Vansickle v. Haines*. But is there any real conflict? It will be observed that the *Broder Case* turned (so far as the plaintiff's title from the railroad company was concerned) on the reservation clause in the act constituting the grant to the company, and the court held that "a lawful claim," within the meaning of the reservation in the act of 1864, was "any honest claim evidenced by improvements and other acts of possession." The construction given to the language of the reservation, of course, implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 or 1866, had not been treated by the government in those acts as mere trespassers, but as there by license. It does not imply that they had acquired any title which could be asserted against the United States or its grantees, except so far as their occupations of land or water were protected and reserved to them by acts of congress.

In *Broder v. Water Co.* the claim of the appropriator was recognized in the grant to the railroad company, and prior to the initiation by the plaintiff of proceedings to secure a pre-emption. In the case at bar the grant of the lands to the state (containing no reservation of the waters of flowing streams, express or to be implied from its terms) was made nearly 30 years before the first appropriation of water by the defendant, which was after the act of congress of July, 1866, and the amendatory act of 1870. *Copp*, Min. Dec. 1873-74, 296.

In *Osgood v. Water Co.*, 56 Cal. 571, it was held that where a person acquired a right, by appropriation, to water upon the public lands of the United States, before the issuance of a patent to another for

lands through which the stream ran, the patentee's rights were, "by express statutory enactment, subject to the rights of the appropriator." The court cited the amendatory act of congress above referred to, the seventeenth section of which reads:

"That all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory."

At the trial of *Osgood v. Water Co.* in the lower court the plaintiff testified that he filed his declaratory statement as a pre-emptor, June 18, 1868, but the court found that defendant's appropriation was prior to that date. There is nothing in that case which precludes us from holding that a pre-emption claim relates to the pre-emption certificate, so as to give the pre-emptor the better right as against an appropriation of water made after the certificate is given to the pre-emptor. The late Prof. Pomeroy, in one of a series of able articles published in the *West Coast Reporter*, questions whether the occupant of public lands, with the qualifications of a pre-emptor, can be deprived of the flow of the stream by an appropriator who commences the acts leading to appropriation after the occupation of the other begins. It is not necessary to consider this proposition in the present case. Two of the members of this court dissented from the conclusion reached in *Osgood v. Water Co.*, on the ground that the waters had not in fact been appropriated in accordance with the local rules or regulations, or with the rulings of the courts. See 2 Pac. C. Law J. 322.

Both *Broder v. Water Co.* and *Osgood v. Water Co.* are (by strongest implication) authority for the statement that one who acquired a title to riparian lands from the United States prior to the act of July 26, 1866, could not (in the absence of reservation in his grant) be deprived of his common-law rights to the flow of the stream by one who appropriated its waters after the passage of that act.

Much stress is laid by counsel on the language used in *Broder v. Water Co.*, *supra*, with reference to the clause in the act of 1866, that water-rights recognized or acknowledged by the local customs, etc., "shall be maintained and protected," "was rather a recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." But this language is to be interpreted in view of the context. The language cannot be construed as a recognition by the court of vested rights in appropriators of water, created by mere appropriation and independent of statute. The case proceeds on the assumption that neither the plaintiff nor the defendant had any rights except such as were granted or recognized by acts of congress. It holds that appropriators of water from streams on (or flowing to) the lands granted by the act of 1864 were "recognized" or admitted to have rights which were protected by that

act, because the act by its terms reserved from the grant to the railroad company every "lawful claim;" that one who had been permitted to divert water from those lands had a claim which was not in itself unlawful; and that the reservation included "*every honest claim evidenced by acts of possession.*" There is no statement in the opinion in *Broder v. Water Co.*, that except for the reservation found in the act of 1864, and the provision in the act of 1866, the defendant would have any right to the water as against the grantees named in the act first named, or their successors in interest. The court holds that Broder acquired no right by virtue of his pre-emption, because his proceedings to secure it were begun after the act of 1866, which recognized the prior appropriation of the water as being a right in the appropriator, and that Broder acquired no right under the railroad grant, because the water previously appropriated was reserved in that grant.

9. *The rights of the state under the grant of September 28, 1850, do not depend upon, nor are they limited by, the decisions of the state courts with respect to controversies upon the public lands of the United States. Those decisions do not enter into, nor operate upon, the subsequent legislation of congress in such manner as to require that the legislation (or its affirmance of rights recognized by the state courts as existing between occupants upon the public lands of the United States) must be construed as an attempt to deprive the state of its vested rights.*

*If the decisions mentioned can be referred to for any purpose, semble, that the occupant of a tract of riparian land (arable or grazing) on the public domain is by such decisions presumed to have received a grant of the flowing water, to the extent of the common-law right to the use of such water as it flows through the land.*

*And if the doctrine as to adverse claims upon the public lands, as declared by these decisions, be extended to lands granted to the state, it cannot affect the title or estate of grantees of the state, the water not being reserved in the grant, or in the legislation authorizing the grant. The doctrine is applicable alone to actions in which both parties claim only by possession.*

It is insisted that the "doctrine of appropriation" is not, and never was, applicable to public lands, state or United States, in California. It may be conceded that while lands continue public lands, and in controversies between occupants of land or water thereon, the common-law doctrine of riparian rights has no application. But where one or both of the parties claim under a grant from the United States, (the absolute owner, whose grant includes all the incidents of the land, and every part of it,) it is difficult to see how a *policy* of the state, or a general practice, or rulings of the state court with reference to adverse occupants on public lands, can be relied on as limiting the effect of grants of the United States, without asserting that the state, or people of the state, may interfere with "the primary disposal of the public lands."

It has been urged that the courts of this state should adopt the doctrine of *appropriation* as it is accepted in Colorado; but, if it be conceded that the Colorado decisions can be sustained on any legal principle, the legal conditions here are different. The sixth and seventh sections of article 16 of the constitution of that state read:

"Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right, as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

"Sec. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation."

In *Coffin v. Left-hand Co.*, 6 Colo. 447, *Schilling v. Rominger*, 4 Colo. 102, is referred to apparently as authority for the statement that, in the absence of express statute to the contrary, the first appropriator of a natural stream has the better right, as against a subsequent patentee of the lands below. But *Schilling v. Rominger*, was a contest between appropriators of land and water on the public lands, none of whom had any title other than possession. In *Coffin v. Left-hand Co.*, both the appropriation of the water and the patent to the riparian land preceded the act of congress of 1866, and of course the adoption of the state constitution in 1876. The appropriation of the water was prior to the patent. So far as the decision does not depend upon the statutes of the territory of Colorado it is in conflict with *Vansickle v. Haines*; the learned court being of the opinion that the Nevada case was overruled by *Broder v. Water Co.* But as we have seen (*supra*) in *Broder v. Water Co.* it was held that in the grant of lands to the railroad company the water was reserved for the benefit of the prior appropriator. And even if the case last mentioned could be held to have decided that the right acquired by one who appropriated water on the public lands *prior* to a grant to another of land over which the stream would flow (made before the act of 1866) was a vested right, protected, although not mentioned nor referred to, in the grant, still there is nothing in that case which would give preference to an appropriation of water made, as in the case at bar, long after the grant of the land.

If, by the act of congress admitting Colorado into the Union, with a constitution containing the provisions above recited, the United States *could* abandon the primary disposal of its lands to the extent that not only every subsequent, but every prior, grant of land would be subject to an appropriation of water made prior to the grant, this would not affect the question as applied to the facts of the case now

before us, since our constitution does not contain provisions like those in the constitution of Colorado; and here the grant of the land preceded the appropriation; and so if the United States is bound by the territorial statutes, as construed by the supreme court of Colorado. In *Coffin v. Left-hand Co.* the appropriator was given the preference, by virtue of certain statutes of the territory of Colorado, passed in 1861, 1862, and 1864. It may be that in interpreting these statutes the court was somewhat influenced by the general proposition already laid down or assumed in its opinion, that, in the absence of express statute, the prior appropriator of water had the better right as against all the world. But the territorial statutes were so construed *as to give the right* to the prior appropriator. It would seem clear, however, that the rights of parties who claimed title under grant from the United States of parts of the public domain must be determined by reference to laws of the United States relating to the disposition of its domain; and this fact is recognized by the supreme court of Colorado, which appeals to *Broder v. Water Co.* as supporting its interpretation of those laws.

It may be suggested, however, that the rulings of the courts of California with reference to possessory rights on the public mineral lands enter into, and in some manner limit, the effect of grants of land by the government of the United States, made, as is assumed, under statutes enacted in view of the local law, and of the varying rules and regulations of mining districts. The statutes passed long afterwards cannot affect rights acquired by the state by virtue of a grant made in 1850, nor can the subsequent *policy* of the United States (which is supposed to be indicated by a failure, by express laws, to prohibit the occupation of portions of its lands for mining, etc., and by the omission of the executive officers to attempt to remove miners and other occupants by force) be held to affect the rights acquired by the state through the grant of 1850.

The law of California, with reference to priority of possession on the public lands, has been so long established that we are apt to forget the whole system was built upon a presumption entertained by the courts of a permission from the United States to occupy. It was said by HEYDENFELDT, J., in 1856:

"One of the favorite and much-indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged where the fact presumed cannot have existed. In support of this proposition I will refer to a few eminent authorities. \* \* \* In these cases presumptions were indulged against the truth,—presumptions of acts of parliament and grants from the crown. It is true the basis of the presumption was length of time, but the reason of it was to settle disputes, and to quiet the possession. If, then, lapse of time requires a court to raise presumptions, other circumstances which are equally potent and persuasive must have the like effect for the purposes of the desired end; for lapse of time is but a circumstance or fact which calls out the principle, and is not the principle itself. Every judge is bound to know the history, and the leading traits which enter into the history, of the country

where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little as yet has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the state government to the present time. Upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses: and, indeed, have done, in the various enterprises of life, all that is useful and necessary in the high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them, in some instances, and recognized them in all. Now can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption. Then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed." *Conger v. Weaver*, 6 Cal. 556, 557.

Both the right to appropriate water on the public lands, and that of the occupant of portions of such lands, are derived from the implied consent of the owner, and, as between the appropriator of land or water, the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority. *Irwin v. Phillips*, 5 Cal. 140. Since the United States, the owner of the land and water, is presumed to have permitted the appropriation of both the one and the other, as between themselves the prior possessor must prevail. None of the early cases intimate that the occupant of land bordering on a stream was presumed to have any less rights in the usufruct of the water than the absolute owner of the land so situated, or that the presumption in his favor was limited to the land, without the water, except where the water had been already appropriated.

It was said by Chief Justice MURRAY, in *Crandall v. Woods*, 8 Cal. 143:

"If the rule laid down in *Irwin v. Phillips* is correct as to the location of mining claims and water ditches for mining purposes, and *priority* is to de-

termine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. The simple question was that as between persons appropriating the same land, or land and water both, as the case might be, that the subsequent appropriator takes subject to the rights of the former. But an appropriation of land carries with it the water on the land, or a usufruct in the water; for in such cases the party does not appropriate the water, but the land covered with water. If the owners of the mining claim, in the case of *Irwin v. Phillips*, had first located along the bed of the stream, they would have been entitled, as riparian proprietors, to the free and uninterrupted use of the water, without any other or direct act of appropriation of the water as contradistinguished from the soil. If such is the case, why would not the defendant, who has appropriated land over which a natural stream flowed, be held to have appropriated the water of such stream, as an incident to the soil, as against those who subsequently attempt to divert it from its natural channels for their own purposes. One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and the fact is established that he acquired his right subsequent to those of others, then, as both rest for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule *qui prior est in tempore potior est in jure* must apply."

The learned judge then proceeds to speak of the alleged evil consequences of the rule he had laid down, saying:

"Let us examine the effect of such a rule for a moment, and see if the consequences which the respondent predicts, viz., the destruction of the use and value of ditch property in the mines, will necessarily flow from it. A. has located mining claims along the bed of a stream, before any water ditch or flume has been constructed: will any one doubt that he should have the free use of the water, as against subsequent locators of either mining claims or canals? Or, suppose he had located a farm, and the water passing through his land was necessary for the purposes of irrigation, is not this purpose just as legitimate as using the water for mining? It may or may not be equally as profitable, but irrigation for agricultural purposes is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial, want, or a mere stimulant to trade and commerce. If it is understood that the location of land carries with it all the incidents belonging to the soil, those who construct water ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators." Id. 143, 144.

*Crandall v. Woods* very distinctly decides that as between an occupant of riparian land (part of the public lands of the United States) and a subsequent appropriator of the waters of the stream the former may assert the riparian right. It is claimed, however, that so far as that case decides that the riparian occupant may, under such circumstances, assert a right to the flow of the water beyond the extent to which he has actually appropriated the same for irrigation or other

useful purpose, it has been reversed in later adjudications, if not expressly, yet by necessary implication.

In some of the subsequent California cases, where the riparian owner claimed in his pleading, and relied at the trial, on an actual prior appropriation of water, the court confined its inquiry to the existence or non-existence of the facts alleged.

Thus, in *McDonald v. Bear River*, 13 Cal. 220, one of the parties, although in possession of a tract through which the water-course ran, claimed an actual prior appropriation of water for turning his mill. It may be observed, however, that, at the common law, the extent of the mill-owner's right might depend in part on the actual erection and size of his dam, etc.; and, since the exercise of the particular right might depend on affirmative acts, the case of water for a mill might differ perhaps in its nature, or extent rather, from that of the riparian owner whose lands are naturally irrigated by the flow.

*American Co. v. Bradford*, 27 Cal. 360, was an action at law for damages, in which the plaintiff claimed as an appropriator of water through a ditch. The defendants answered that long prior to the location of plaintiff's ditch and dam they had located and worked in the creek certain mining claims, whereby they became entitled to the use and possession of the waters of the creek, or so much thereof as might become necessary for their mining claims, *as prior appropriators of the water*. Moreover, the general verdict in favor of the plaintiff included a finding that the mining claims were not located and worked prior to the plaintiff's appropriation.

In *Yankee Jim Co. v. Crury*, 25 Cal. 504, it was said that the use of a water-course on the public mineral lands may be held, granted, abandoned, or lost by the same means as a right of the same character *issuing out of lands to which a private title exists*.

In *Hill v. King*, 8 Cal. 336, and *Bear River, etc., v. New York Min. Co.* Id. 329, it was held that where the constructor of a ditch had diverted water he could not complain of the muddying of it by the working of a mine above. To permit this, the court said, would be practically to deprive the miner of the use of the water in his business; and any injury from the incidental fouling of the water was *dumnum absque injuria*.

But in *Hill v. Smith*, 27 Cal. 476, where water was appropriated through a ditch, and a mining claim was afterwards worked above, it was decided that the miner had no right to work his claim in such manner as to mingle mud and sediment with the water so as to fill up the ditch and reservoirs, and thus to lessen their capacity, and increase the expense of cleaning them out; that the prior appropriator of the water was entitled to its use and enjoyment *for the purposes for which he claimed it*.

*Pope v. Kinman*, 54 Cal. 3, was an action to quiet title to the flow of a stream, the plaintiff being the owner of riparian lands by grant from Mexico. Held, that the plaintiff had an interest in the living

stream which flowed over his land, called the "riparian right;" and that the defendant, by mere diversion, could not deprive him of that interest or usufruct.

*Zimmer v. San Luis W. Co.*, 57 Cal. 221, not only recognizes the riparian right, the land not being public land, but holds that a recital in a deed that the grantee is about to divert the waters of a certain creek, (which flows through the grantor's land,) and to appropriate the same, followed by a grant of a right of way to conduct water over the land of the grantor, does not estop the grantor from denying the right of the grantee to divert the water.

As we understand *Ferrea v. Knipe*, 28 Cal. 340, the appellant made the claim that the doctrine of "appropriation," applicable to controversies on the public lands, was also the controlling doctrine in a suit between private owners on the same stream. The court held that the common-law rule obtained, and that the inferior riparian proprietor was entitled to the natural flow, undiminished, except by the use of the superior proprietor for domestic purposes and reasonable irrigation.

So far as the cases cited relate to the adverse claims of possessors of land or water on the public lands, no one of them, by its terms or by necessary implication, overrules *Crandall v. Woods*. It is intimated, however, that that case should now be overruled as not in harmony with the reasons which induced the courts to adopt the rule giving the preference to the prior possessor. It is said that the right acquired, with great expenditure of money and labor, by the ditch-owner, ought not to be restricted by the occupant of a tract of arable or grazing land. The suggestion repeatedly returns that the amount of money invested by the respective parties should have its influence in determining their rights, or at least in fixing the rule by which their rights are to be determined. The same suggestion (that the amounts expended under the implied license of the United States should control in fixing the rule of right) was urged in the *Debris Cases*, but seems to have received little consideration in the courts of the state, or of the United States. In the case of an occupant of land, as in the case of an appropriator of water, the decisions are based on the presumption that the United States has made a grant which in fact it has not made. The effect of the presumed grant of land over which water flowed was logically ascertained (in *Crandall v. Woods*) by reference to the principles of the common law, according to which every part of the land, and all its incidents, passed by the grant. If we were prepared to say that *Crandall v. Woods* was wrongly decided, still, there is good reason why, if wrongly decided, it ought not to be overruled in this case. The rulings of the state courts, with reference to controversies on the public lands while they remain such, cannot of themselves operate to deprive the state of the benefit of the grant of the waters of streams flowing over the land granted by the act of September 28, 1850; nor operate upon subsequent legislation of

the congress of the United States, so that such legislation shall retroact and deprive the state of its vested rights. If the decisions referred to are applicable to lands belonging to the state, yet, since they are applicable only to controversies between adverse claimants to the possession, they do not limit the right or title of the grantees of the state. The title of the state's grantees depends upon the state laws providing for the disposition of its lands.

10. *The common law as to the riparian right was not abrogated by certain statutes of the state applicable to a district of country within which is included the county of Kern, nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of congress of 1850.*

From what has been said it appears that the respondent has not derived from the *United States* a right to divert the water of a flowing stream from the lands granted to the state in 1850, or from the premises of a grantee of the state to a portion of those lands. It is in order to inquire whether the state itself has authorized such diversion.

It is claimed that, so far as the territory comprised within Kern county is concerned, the common-law doctrine of riparian rights, if it ever existed, does not exist, but has been repealed, and the law of "appropriation" adopted, by certain statutes. The county of Kern was created by the act of April 2, 1866, which took effect June 2, 1866. It was formed of portions of Tulare and Los Angeles counties. On the fifteenth day of May, 1854, an act was passed (St. 1854, p. 76) providing for the election in each township of certain counties (including Tulare and Los Angeles) of a board of three "water commissioners" and an overseer. The commissioners were to examine streams, and apportion their waters "among the inhabitants of their district," on petition to lay out and construct ditches, etc. The overseers were to execute the orders of the commissioners, superintend works directed by them, and see that the water was kept clear and the ditches in repair. Section 14 of the act provided: "No person or persons shall divert the waters of any river, creek, or stream from its natural channel to the detriment of any other person or persons located below them on any such stream." February 19, 1857, April 28, 1860, and again, February 21, 1861, the act of May 15, 1854, was amended, but not so as to affect any question involved in the present case. St. 1857, p. 29; St. 1860, p. 335; St. 1861, p. 31. The second, third, and fourteenth sections of the act of May, 1854, were amended by the act of April 10, 1862. St. 1862, p. 235. The second section, as amended, provided that the supervisors, instead of the county judge, should order the election of the commissioners, etc. The third section gave the commissioners power to determine what water-courses ought "to be appropriated to the public use," to apportion the water, etc. And the fourteenth section, as amended, (the third section of the amendatory act,) declared:

"No person or persons shall divert the waters of any river, creek, or stream from its natural channel, to the detriment of any other person or persons located below them on any such stream, unless previous compensation be ascertained and paid therefor, under the provisions of this act, or under the provisions of other laws of this state, *authorizing the taking of private property for public uses.*"

It would be difficult to invent a combination of words which would more explicitly recognize a property to the flow of the stream in the riparian owners below the point of diversion.

The statute of 1854 and the amendments authorized (or attempted to authorize) the commissioners to decide whether a water-course should be condemned or "appropriated" to the public use, and to divert and apportion the waters of the stream so appropriated. Evidently, by the persons who are not to be detrimented without compensation, is meant the inferior riparian proprietors, whose property in the waters may be taken for the "public use" on payment of due compensation, according to the laws of the state "authorizing the taking of *private property* for public uses." If not they, whom else? The scheme, if valid, necessarily excludes any diversion at all by a private person of waters of a stream "appropriated to the public use" by the commissioners, and any diversion or appropriation through ditches other than those made under the direction of the commissioners. The persons, then, who are prohibited from diverting water to the injury of those below, except on due compensation, are the commissioners, and those acting under command of the commissioners. Nor can it be said that everybody else might be made to suffer detriment without compensation by diversion of water by the commissioners, except only those persons who had "appropriated" waters of the stream prior to the act of 1854, and who continued to use the same. If the intention had been to protect, or rather to recognize, the rights of that class only, (if any such class existed,) we cannot but believe that the purpose would have been expressed in appropriate language. The language of the provision is sweeping, and while, perhaps, broad enough to include non-riparian proprietors who had diverted water prior to the act, is peculiarly applicable, and certainly includes those who had acquired the title to riparian lands prior to a diversion, and also includes prior riparian occupants,—*"no person or persons shall divert,"* etc. The term "location" has been very generally applied to occupations of portions of the public domain, while diverters of waters have been called, and throughout the elaborate briefs of counsel herein are called, "appropriators." The amendatory statute not only recognizes the riparian rights of those in possession of lands through which the stream "appropriated to public use" may pass, but is a legislative construction of the words (if any such construction were needed) found in the fourteenth section of the original act of 1854,—*"to the detriment of any person or persons located below them on such stream."*

The act of April 4, 1864, (St. 1863-64, p. 375,) provided for the election of three water commissioners in the county of Tulare, etc. It also contains the clause: "No person or persons shall divert the waters of any river or stream from its natural channel to the detriment of any person or persons located below them on the same stream." Section 10. March 20, 1866, certain sections of the act of 1864 were amended. St. 1865-66, p. 313. By the amendments the water commissioners and overseers were shorn of their powers and duties. For the first time water "companies," and the "president or authorized agents" of such, are spoken of. The commissioners were no longer required, upon the petition of "those interested," to lay out ditches and apportion the water "among the persons using the same," in proportion to the amount of land "each person may wish to irrigate;" no longer empowered to levy a labor tax on such persons; and no longer required or permitted to publish a schedule of the number of hours during which each of such persons should be entitled to use water. Their duty was simplified, and was limited to the appointment, as overseer of a ditch, of *the person designated by the owners of such ditch*. The services of the commissioners, instead of being paid for, as provided in the act of 1864, out of a tax collected of those supplied in proportion to the quantity of water used by each, were to be compensated "by the parties requiring their services." Section 4. And, in this connection, it may be remarked, it was prudently provided: "No ditch shall hereafter be taken out of any stream, in the waters of which different persons have an interest, without leave of said commissioners." And by the amendments (sections 3, 4) the *overseers* no longer had the duty imposed upon them of examining ditches, or of estimating the labor necessary to put them in repair, or of reporting the same to the commissioners, together with the capacity of the ditches, and the quantity of ground irrigated by each, or of ascertaining that the water was used as apportioned, and that the required labor was properly expended. Instead of all this, the overseers were simply to execute the orders of the persons employing them, by whom they were to be paid "such compensation as may be agreed upon."

Thus, by the amendatory act, the commissioners and overseers became the mere agents of the owners of ditches, or of "companies." For section 5 of the act of 1864 was substituted matter foreign to the original section, the substituted matter being:

"Each overseer shall, every three months, (each counting from the date of his appointment,) make up a statement in writing of the number of days that he has been engaged in the discharge of his duties, together with the amount due him as compensation therefor; and, upon the approval of the same by the *president or authorized agent of the company employing him*, shall apportion the same to the different members of such company *pro rata*, in proportion to the interest of each therein; and thereupon shall have the right of action against each owner in the ditch for which he is overseer for the amount so apportioned to such owner." St. 1865-66, p. 313.

And by section 6 of the act of 1866 (amending section 7 of the act of 1864) it is provided:

"Whenever a majority in interest of the owners in any ditch company, or their authorized agent, shall deem it necessary to repair, *enlarge, or extend* their ditch, they shall cause a notice, either written or verbal, to be served upon each owner therein, specifying a time to commence work thereon; and any owner therein neglecting or refusing to perform his proportion of such labor, or pay his proportion of the cost thereof, shall forfeit his right to the use of any water from such ditch until such time as he pays the same to the person or persons performing his proportion of such labor, together with 10 per cent. per month thereon additional. The number of hours constituting a day's labor, and the value thereof, shall be determined by the respective water-ditch companies in the rules and regulations they may severally adopt," etc. St. 1865-66, p. 314.

The act of 1864, then, as amended by the act of 1866, declares the law which, as claimed by counsel, has been substituted for the common law. But the act as amended (if it be conceded to be valid) does not adopt any general rule of appropriation. It seems to have been studiously prepared in the interest of the companies then existing, with a proviso that the commissioners—employed and paid by those of such companies as might choose to employ them—*may permit* new ditches to be dug. If the act of 1866 is in force, it should at least be made to appear that the defendant has acquired rights under it. If the act could be construed as declaring the assent of the state to the diversions of water then existing, or to such diversions as might subsequently be made with the consent of the commissioners named in the act, the assent of the state was limited to such diversions. It nowhere appears that the respondent obtained the consent of the commissioners to the construction of its works; and, as we have seen, the act expressly prohibits any new ditch or canal "without leave of said commissioners." Section 2, subd. 3. Sections 7 and 8 relate to the internal management of the companies or corporations, the obligations of its members to each, and the mode of enforcing them. The rest of the act provides for the discharge of functions by the commissioners and overseers as servants of the companies.

The intent of the legislature to change the previous law as to riparian rights, or to estop the state and its grantees from asserting them, ought to be made to appear distinctly. But the saving clause of section 10 of the act of 1864 was not repealed by the act of 1866, and that section prohibits any diversion to the detriment of those located below on the stream. Moreover, section 10 of the act of 1864 is almost precisely like section 14 of the act of 1854 and the first clause of section 3 of the act of 1862; and the first clause of section 3 of the act of 1862 is interpreted legislatively, by the last clause of the same section, as intended to protect the lower riparian proprietor, except that his property right in the water might be condemned, on due compensation, "under the provisions of the laws of this state au-

thorizing the taking of private property for public uses." St. 1862, p. 235.

The omission of the last clause of the sentence in the subsequent laws is not to be construed as a withdrawal of all protection from the riparian owners, (among whom might be other persons than the state,) but rather as indicating an intention to make that protection absolute. It is to be presumed that in amending the section the members of the legislature were influenced rather by a doubt of the validity or propriety of its last clause than by an intent arbitrarily to take from the riparian proprietors a valuable right, or to deprive a whole class of a right they had previously enjoyed; and the omission should thus be construed, even if it might be held, as matter of law, that the deprivation of the right could not constitutionally be enforced against those who had already located on the stream when the statutes were passed. In ascertaining the meaning of the law we find that the protection accorded was clearly intended to apply to locations already made when each of the statutes was passed, and to locations which should be made prior to any subsequent appropriation.

11. Section 1422 of the Civil Code ("*the rights of riparian proprietors are not affected by the provisions of this title*") is protective, not only of riparian rights existing when the Code was adopted, but also of the riparian rights of those who acquired a title to land from the state after the adoption of the Code, and before an appropriation of water in accordance with the Code provisions.

Neither a grantee of the United States, nor the grantee of a private person, who was a riparian owner when the Code was adopted, need rely for protection on section 1422. Such persons are protected by constitutional principles.

The state might have reserved from her grants of land the waters flowing through them for the benefit of those who should subsequently appropriate the waters; but the state has not made such reservation.

The water-rights of the state, as riparian owner, are not reserved to the state by section 1422, because (wherever the state has not already parted with its right to those who have acquired from her a legal or equitable title to riparian lands) the provisions of the Code confer the state's right to the flow on those appropriating water in the manner prescribed by the Code.

It is contended by respondent that the Civil Code gives to it a right to the water superior to that of the riparian proprietor below; that, as against an appropriator under the Code, one who has acquired a title to lands from the state (subsequently to the Code, although prior to the water appropriation) has no right in or to any of the water.

Title 8, pt. 4, div. 2, Civil Code, reads:

"Sec. 1410. The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation.

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right.

"Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of [giving the number] inches, measured under a 4-inch pressure. (2) The purposes for which he claims it, and the place of intended use. (3) The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimant of the rights to the use of the water as against a subsequent claimant who complies therewith.

"Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

"Sec. 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title.

"Sec. 1422. *The rights of riparian proprietors are not affected by the provisions of this title.*"

The fourth section of the Civil Code declares that the rule that statutes in derogation of the common law shall be strictly construed has no application to the Code. And it is added: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

Counsel for respondent contend that section 1410 of the Civil Code promulgates a general law declaring the doctrine of appropriation to be the law of the land, and argue that, if it be admitted, the legislature could not divest the owner of the banks of a water-course of his riparian rights; the doctrine of appropriation was adopted as the general law, applicable to all public lands of the state and of the United States from the point of time when section 1410 was enacted; and, it is said, the whole purpose of section 1422—"the rights of

riparian proprietors *are not affected* by the provisions of this title"—is subserved by saving rights *then* vested. It is urged that the words "rights of riparian proprietors" are used either in a generic sense, as indicating that principle of law known generally as the doctrine of riparian rights, or else they are used in the more limited sense of private rights of individuals who then (when the Code was enacted) owned lands on the banks of streams whose source was on, or which flowed over, public lands; that it is too self-evident for serious question that the words cannot have been used in the more enlarged sense; for, give them that interpretation, and you have, in the same statutory enactment, a declaration of two diametrically antagonistic principles,—the doctrine of appropriation and the doctrine of riparian rights,—doctrines which cannot co-exist. But, it is said, giving the words the other and more restricted interpretation, each and all parts of the statute harmonize one with the other, and the declaration of section *four* is respected; that the law of the state being appropriation, its grant of the land, made after the Code enactment, carries with it no right to the water; for since such right can only be derived from some existing law, and the Code has abrogated or repealed the law of riparian rights, (except to the extent of preserving those then existing,) there is no law under which the right to the water as part and portion of the title granted can arise.

As stated above, it is claimed by respondent that by the provisions of the Civil Code the doctrine of appropriation was adopted as the general law of the state, applicable to all *public lands* of the state and the United States, from the time section 1410 was enacted. But section 1410 is not limited in its application to the *public lands*. Subject to the saving or reservation clause of section 1422,—whatever that section may mean,—section 1410 declares the law applicable throughout the state. It seems to be admitted that (conceding the rights of riparian proprietors to be measured by the common law) riparian rights already vested were not taken away by section 1410, and could not be taken away, except for the public use and on due compensation. It must follow, independent of section 1422, that a purchaser from one who was a riparian owner when the Code provisions took effect, by purchase made after the Code enactments, would acquire all the estate and property of his vendor. Otherwise, private property would be taken without due process of law, since arbitrarily to deprive the owner of property of all capacity to sell it is to deprive him *pro tanto* of its benefits. "The right of acquiring, possessing, and protecting property is inalienable." "No man shall be deprived of his property without due process of law." Const. 1849, art. 1, §§ 2-8; Const. 1879, art. 1, § 14. The provisions of the constitution are intended effectually and completely to protect substantial rights, and cannot be frittered away by indirect legislation. And, as we have seen, one who since the acts of congress of 1866 and 1870 receives a grant of a portion of the public lands of the United

States, without special or implied reservation, takes subject only to appropriations of water made or initiated *prior* to his grant. Let us suppose, after the adoption of the Code, but before any appropriation of the water flowing to the tract granted, a grant or patent for land to be issued by the United States. Could section 1410 be held to divest the grantee of his right in the flow of the stream? True, he has accepted his grant in the presence of the state statute. But the United States has undertaken to clothe him with the title to the land, with the appropriate use of the water as part of the land. Would not a state law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the "primary disposal" of the public lands?

We do not find it necessary to say that the prospective provisions of the Code would violate the obligation of a contract; but when the state is prohibited from interfering with the primary disposal of the public lands of the United States there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents. The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in the water flowing to, or in the trees on, or the mines beneath, the surface, but others of our citizens shall have the privilege of removing all these things, is to say that hereafter the United States shall not sell the water, wood, or ores.

It would seem, then, that the only persons who can find it necessary to resort to section 1422 of the Civil Code as the protection of their right to the flow of running waters are the state, (as the owner of lands granted to it by the United States,) and grantees from the state, unless it be where the adverse parties are merely occupants of land and water, respectively, on the public lands of the United States or of the state. While the common law has been in force, not only has the right of eminent domain been in the state, but the state has been the direct owner of the swamp and overflowed, as well as of other, lands derived by grant from the general government. The state legislature has had power not only to dispose of the lands and waters so held separately, as a private person may dispose of his own, but has had power to authorize the diversion of waters from such lands, either by private persons, the owners of lands above, or by private persons on public lands of the United States lying above. From the date of such general authorization a grantee of land from the state would take subject to appropriations of water actually made, and, if the statutes were broad enough, and operated a reservation of waters in favor of appropriations which might afterwards be made, would take subject to subsequent appropriations.

But the statutes of the state cannot properly be construed as reserving from grants of state land the use of the waters flowing thereon, for the benefit of those who shall subsequently take or appropriate them either on or off the state lands. The state has granted the waters running to its own lands by authorizing the diversion of waters from its lands, and, doubtless, such grantees acquire the state property in the waters, whenever the state has a property in the waters at the time of the grant. But can it be said that, from the date of the Code, the state reserved its waters in trust for those who should afterwards appropriate them? Our attention has been called to no provision of the laws providing for the disposition of the state lands which contemplates such reservation; and we see nothing in the law authorizing appropriations of water which can reasonably bear such interpretation. We must look for the definition of "riparian rights"—protected by section 1422—to the *common law*, which (when not in conflict with or repugnant to the constitution and state statutes) had been the law of the state for more than 20 years. The section which provides "the rights of *riparian proprietors* are not affected by the provisions of this title" declares, in effect, that those appropriating water under the previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state a title to, or right of possession in, riparian lands, before proceedings leading to appropriation shall be taken. Such is the meaning of the words employed.

The right to the use of the waters as part of the land once vested in its private grantee, the state has no power to divest him of the right except on due compensation. It is for those who claim that, since the Code enactments, riparian rights have never vested in the state's grantees, to point to the statute which expressly so declares, or which, by necessary implication, operates a reservation of all the waters on the state lands for the benefit of subsequent appropriators. Such reservation cannot be assumed, nor be based on any doubtful interpretation of language. The use of the present tense—"the rights of riparian proprietors *are* not affected"—is not sufficient to justify a finding of a reservation by the state of all its waters. It is difficult to believe that the section, so far as it applies to riparian lands not those of the state, is other than *declaratory* of the pre-existing law. It certainly was intended to be declaratory in so far as it announces the protection of all private persons who had acquired riparian rights from any source before the provisions of the Code went into operation, since (if the common-law right existed) such persons were protected independent of the section. We cannot presume that it was intended to limit the protection to those private persons who had then acquired riparian rights from the United States, (but not through the state,) or from Spain or Mexico, and to deprive the subsequent grantees of such of their riparian rights. The legislature had no power to deprive of their right to water the subsequent grantees or

successors of those private persons in whom the right had vested prior to the Code. The attempt would have been violative of constitutional principles. As the language of section 1422 will bear a reasonable interpretation which will render it applicable everywhere within the limits of the state, and to all classes of riparian proprietors, (without impinging upon the vested interests of any,) we ought not so to construe it as that, if enforced with respect to all, it would deprive any man of his constitutional right.

Our conclusion on this branch of the case is that section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code. If section 1422 of the Civil Code were interpreted as saving *all* riparian rights actually vested before the section took effect, the mere appropriator could acquire no rights to water by virtue of the provisions of the Code, but would be left to the enjoyment of such as he might secure by convention with the riparian proprietors. If all riparian rights existing when the section was adopted were preserved by section 1422, then, inasmuch as both the state and the United States were at that time riparian owners, the lands of neither government would be affected by the other sections relating to water-rights; nor, of course, would any subsequent grantee of either government be affected by those provisions.

It is contended by counsel for *appellants* that the rights of the state to the flow of the waters on her lands were not affected by the Code for the further reason that the Code provisions were intended merely to continue or supply a rule for deciding disputes "on the public lands of the United States." But we think it was the manifest purpose of the legislature—derivable from title 8, as a whole, read in view of the judicial and legislative history of the state—that the rule should be the same whether applied to mere occupants of the lands of the state or of the United States, and that the riparian rights of the state, as owner of lands, were not preserved by section 1422.

As we have seen, by resort to the presumption of a grant or license from the owner of the paramount title, our courts from an early day have determined controversies between occupants of waters, or of lands and waters, on the public domain of the United States, holding the prior possessor to have the better right; and, during its first session, the state legislature provided a mode by which one might acquire a constructive or statutory possession of a portion of the unsurveyed, and as yet unsalable, public lands of the United States, to be accepted by the courts as proving a right to the possession against all but the government. Act "prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," (St. 1850, pp. 20-23.) The validity of such acts, so far as they affect mere intruders on the public lands, or those entering

thereon with the tacit consent of the government, has not heretofore been questioned. The right of the prior occupant of the land or water on the public domain of the United States being recognized by the courts, it cannot be doubted that the legislature had power to establish or change a rule of evidence according to which the prior occupation is to be proved. With reference to appropriations of waters on public lands, for example, the legislature had power to require that the notice of appropriation should contain certain statements; that work should be commenced within a definite time, and be completed within a named period, etc. Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States. Nevertheless, while a body of land and the waters thereon shall remain a portion of the public lands of the United States, the rights of mere possessors, or asserted possessors, thereof will continue to be determined, as between themselves, by the law applicable to such controversies as the same was laid down by our courts previous to the Code enactments, except so far as it may have been modified by the provisions of the Code. The legislation of the state, (with reference to occupations on the public lands,) like the judicial decisions, is based on the presumption that the general government has permitted the occupation of water, or of land with the water thereon, as the case may be. But this (so far as the operation of the state law is concerned) necessarily excludes the United States, although a riparian owner when the Code was adopted, from the saving clause of section 1422.

The doctrine of presumption is enforced, however, not only on lands of the United States, but on lands of the state and of private persons. This has been the rule applied in every action of ejectment where the plaintiff has recovered on his prior possession. In such cases it has repeatedly been held that the defendant cannot be permitted to prove title in a third party unless he connects himself with it. The prior possessor is presumed to have acquired *that* title as against the mere intruder on his possession. In controversies upon the state lands the courts have not heretofore permitted the title of the state to be proved, by one not deraigning from the state, for the purpose of destroying the asserted right of the prior possessor. Even where a court should be called on to take judicial notice of the state title, and that no law had been passed for the disposition of the state lands, it would, in the interest of peace and good order, presume, "contrary to the fact,"—as was said by Mr Justice HEYDENFELDT,—not only that the prior possessor had entered and occupied with the consent of the state, but that he had acquired the state title.

Prior to the adoption of the Code there can be little doubt that in controversies between persons upon the lands of the state, as in like controversies upon lands of the United States, (where neither of the

parties had derived title from the government,) the doctrine of priority of appropriation of water alone, or of water as a part of land appropriated, would prevail. These considerations create a very strong presumption that the riparian rights of the *state*, as a landed proprietor, existing when the sections of the Code went into operation, were not intended to be reserved by section 1422. Inasmuch as the sections of the Code relating to water-rights (so far as they relate to appropriations of water on the public lands of the state, or of the United States) are in furtherance and recognition of the previous doctrine of the courts of the state, (according to which, as it would seem, the prior appropriator of land, and the water thereon, had the better right, as against the subsequent appropriator of the water alone,) it may be contended that section 1422 recognizes and reaffirms that part of the rule, and protects the riparian *occupant* on the public lands of the state from a subsequent appropriation of water on or above those lands. Either so, it may be argued, or section 1422 has no meaning or application when the controversy is between mere occupants on the public lands. But, however this might be, where both parties were mere possessors on public lands of the United States, the title 8 of the Civil Code, so far as it relates to waters flowing to the lands of the state, is more than an acknowledgment of the doctrine of prior appropriation on public lands. It is plainly a concession to those who may comply with its conditions, which operates as a grant of the servitude when the conditions are fully performed, relating back to the date of the commencement to perform. It is a concession, however, only of the rights to the water which the state shall not already have parted withal when the appropriation shall be made.

12. *The statute of April 13, 1850, adopts the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law.*

*In ascertaining the common law of England we may and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States, and of the several states, down to the present time. We are not limited to the consideration of the English decisions rendered prior to July 4, 1776.*

*The possessory rights of occupants of portions of the public lands, or of waters thereon, (recognized by the California courts,) are protected by the common law.*

It must be assumed, as the cause is now presented, that the plaintiffs obtained from the state title to riparian lands prior to an appropriation of water flowing to those lands by the defendant; because, as we shall see, the court below erred in refusing to admit certain evidence bearing on that issue. Inasmuch, then, as the defendant here has acquired no right to the water by it appropriated, by reason of a reservation, express or implied, in the grant to the state, or in the conveyances to the plaintiffs, which it can assert against the plaintiffs; and as there is no "public policy" arising out of physical

conditions existing within our borders, or from the implied license to private persons to enter upon and occupy portions of the public lands, or the water thereon, while they remain such, which compels or authorizes us to disregard the general law, or which should control or modify the meaning which should otherwise be attributed to the statutes of the United States,—it follows that the defendant has no right to divert the water from the lands of the plaintiffs, unless that right exists under and by virtue of the *common law*, as the same was adopted in and by the act of April 13, 1850.

It is said by counsel for respondent that the common law adopted by the act of 1850 is the common law *as the same was administered prior to July 4, 1776*. *Throop v. Hatch*, 3 Abb. Pr. 23, is referred to as authority for this statement. But there the question was what was presumed to be the law of another state, in the absence of averment and proof with respect to it. It was held there was no presumption that the *statutes* of another state were the same as those of New York. It is held in California that, in the absence of evidence on the subject, it would be presumed that the statutes of another state are the same as ours. *Hickman v. Alpaugh*, 21 Cal. 225; *Marsters v. Lash*, 61 Cal. 624. In *Throop v. Hatch* the learned judge adds:

“It is well established that the common law is presumed to have originally existed in all the states of the Union, except, perhaps, those which had been, before becoming members of the Union, subject to another Code and system of laws; and it is a well-established presumption of law that things once proven to have existed in a particular condition continue in that condition until the contrary is established by evidence, either direct or presumptive.”

It was therefore ruled, it would be presumed, that the common law had not been changed by statutes of the state whose law was in question.

There is no suggestion (except, perhaps, in the mere statement of a question on page 25) that, in ascertaining the common law, the examination should be confined to decisions of the English or colonial courts rendered prior to the declaration of independence. In that very case many adjudications, made after that event, are cited; and it may be added that it is the uniform practice of the courts in this country to rely upon the reasoning of later decisions of the courts of England and Ireland, and of the courts of other American states, when the question is as to the rules of the common law applicable to the facts before them. It has sometimes been said that the English statutes, down to a period corresponding with the earliest settlement of the colonies in North America, are adopted as part of the common law. Of course, where a statute adopts the English statutes prior to a certain date or reign, and thus impliedly excludes others, the courts in the United States do not regard the statutes passed since the date or reign.

A different question from the foregoing is the question whether, in adopting “the common law of England,” the legislature adopted a

law derivable from the usages and customs of miners and other occupants of public lands. It is alleged, in effect, that the last was a different *law*, with reference to waters, from the common law as enforced in England and other states of the Union. If this were true, it certainly was not adopted by the statute. The substitution of what is now called "appropriation" for the English rule would not be a mere modification of the common law; and, strictly speaking, the common law is not *modified* by an application of its principles to new facts. It is quite certain that the alleged modification could not have been brought about by a general practice which could be upheld, upon the doctrine of license or grant, in accordance with the common law.

In entertaining "against the fact" the presumption that the occupants of land or water, on the public domain, had received grants from the paramount sources of title, the courts of California did not repeal or modify the common law; but, immediately after its adoption, they began to follow the common law in that regard. The English courts had frequently held that a grant from the crown would be presumed from lapse of time. The courts here had held that lapse of time was only a reason for the presumption, and that, upon common-law principles, it might be sustained on other facts. Upon this common-law presumption is based the whole fabric of the law which determines conflicting possessory rights on the public domain. The presumption has no place where either party has received a grant from the government; for a presumptive grant (except perhaps when based on lapse of time) can never be asserted against an actual grant.

By the act of 1850 the common-law presumption was adopted as part of the common law, as was also the application of the presumption, as subsequently held by the courts, since its subsequent reasonable application was implicitly comprised in the presumption itself. Thus, the principles of the common law fully protected the just possessory rights of occupants on the public lands. In adopting the common law, therefore, the legislature adopted the common law, and not some other and different law. "The customs, usages, and regulations of the bar or diggings" were afterwards, by express statute, declared to be admissible as evidence in "actions respecting mining claims." Pr. Act. 1861, § 621. It has always been held that local regulations, etc., accepted by the miners of a particular district, are binding only as to possessory rights within the district, and that they must be *proved* as a fact. When they have been proved, the courts have considered them only for the purpose of ascertaining the extent and boundaries of the alleged possessions of the respective parties to a litigation, and the priority of possessory right as between them, or for the purpose of ascertaining whether the right of action has been lost or abandoned by failure to work and occupy in the manner prescribed. When the priority, limits, and continuation of a possession have thus been ascertained, the courts have proceeded to apply the presumption of grant from the paramount source,—a presumption, we

repeat, sustainable on common-law principles. It is also true (where no special "mining laws" have been proved) that, in ascertaining the limits of a mining possession, the courts have said the same common-law principles are to be relied upon as those which regulate rights to the possession of agricultural lands, although the *indicia* of possession are not necessarily the same. *English v. Johnson*, 17 Cal. 107. The possession, in such case, may be proved by satisfactory evidence of notorious acts of occupation, reference being had to the nature of the lands, the uses to which they can be put, and to the general practices or customs of the region with respect to the occupation of lands of the particular character. But the possession, however proved, being established, the presumption of grant arises.

The act of 1850 adopts the common law of England; not the civil law; nor the *jus commune antiquum*, or Roman "law of nature" of some of the civil-law commentators, (*Brady v. Reese*, 51 Cal. 464, note;) nor the Mexican law; nor any hybrid system; and the expression "common law of England" designates the English common law as interpreted, as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. We cannot presume that the members of the legislature, even at that day, were utterly ignorant of the climate and soil of the country in which they lived; and there were included in their number many natives of California, who must be presumed to have represented the intelligence of a race which, for several generations, had been familiar with natural conditions here existing. The report of the proceedings of the legislature shows that there was a considerable minority in favor of the adoption of the civil law; and there are circumstances appearing from the proceedings tending to prove that the advantages of each system, as the fundamental law of the future, were discussed and fully considered. Under these circumstances, we must believe that if it had been intended to exclude the common law as to the riparian right the intention would have been expressed. Moreover, it is a well-established principle that when the legislature of this state has enacted a statute like one previously existing in other states, the courts here may look to the interpretation of such statute by the courts of the other states. *People v. Webb*, 38 Cal. 477; *People v. Coleman*, 4 Cal. 50; *Taylor v. Palmer*, 31 Cal. 254.

Whatever the law pre-existing the statute of 1850, it was then and there done away with, except as it agreed with the common law. The matter was settled, if the law-makers had power to settle it. And it was not the common law "as the same was administered" at a certain date that was adopted, but the common law. Indeed, the administration of the law in particular cases may be a very different thing from the law itself. [NOTE.—We give counsel for respondent the benefit of the last suggestion, to be applied, if applicable, to the present decision.] The statute adopts the common law of Eng-

land, except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute. Looking at the whole array of adjudications, if we find a question has often been decided in one way,—the cases preceding the line of corroborative and conformable decisions being adverted to in them, analyzed, and held not necessarily conflictive,—the rule of the common law involved or presented in the question ought to be considered as *settled*. There is no pretense that the courts ever were infallible. It is sometimes held that a previous decision does not declare the law. Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because "right reason" has always been the prime element of the law. And in such case, if anything has been said in an earlier decision—which cannot be resolved into mere *dictum*, or as applicable to the peculiar facts—that apparently conflicts with the settled rule, it is considered to be an erroneous exposition of the law. Courts do not repeal former decisions; when they reverse them they hold they were never law.

The common law of England may be said to consist of a collection of principles found in the opinions of sages, or deduced from universal and immemorial usage, and receiving *progressively* the sanction of the courts. It was imported by our colonial ancestors, so far as it was applicable, and was sanctioned by royal charters. 1 Kent, Comm. 473. The best evidence of the common law is found in the decisions of the courts, contained in numerous volumes of reports, and in the treatises and digests of learned men, "which have been multiplying from the earliest periods of English history *down to the present time*." Id. There is no implied exception in the words "so far as applicable" which would exclude the common law from the colonial law, except, perhaps, when the question was *ab ovo*, and no principle of the common law could have appropriate bearing upon it. Since the Revolution the common law of England has, of course, been inapplicable in the particulars that it does not harmonize with the political conditions on this continent. Where it is in conflict with our constitution of government it is not part of our law, because the organic law is the supreme law. This would be the case if the statute were silent; and, as we have seen, the statute of 1850 does not adopt the common law so far as "it is repugnant to or inconsistent with the constitution of the United States, or the constitution and laws (statutes) of the state of California."

We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law. To so hold would be an attempt to do that which, as

contended by counsel, could not be done with reference to the common use to which, as claimed, property was dedicated by the Mexican law. Such conditions may, perhaps, affect the mode of enjoyment of the common right of all the riparian proprietors on the same stream. Nor do we know of cases where the courts in the United States have undertaken to change the common law. We think it is abundantly proved by Mr. Houck that there has been no substantial change in the United States in the law with respect to navigable rivers, (although the contrary has been asserted,) but that the true test of "navigability" was always the fact of a river being in fact navigated, or capable of being navigated; that all streams above tide are not in England innavigable. *Nav. Rivers, passim*. In an English case cited in Woolrych on Waters, 41, Mr. Justice BAYLEY observed: "The strength of the *prima facie* evidence arising from the flux and reflux of the tide must depend upon the situation and nature of the channel;" and held of a petty stream, although the daily tides went up it, that it was not a navigable river. And Woolrych says of the English law: "Public user for the purposes of commerce is consequently the most convincing evidence of the existence of a navigable river." Page 42.

13. *The doctrine of "appropriation," so called, is not the doctrine of the common law.*

Counsel for respondent assert that the property in the use of waters is, by the common law, acquired only by *appropriation*. In support of this proposition are cited *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 Barn. & Ald. 261; 2 Bl. Comm. 14, 403; *Cox v. Matthews*, 1 Vent. 237; *Liggins v. Inge*, 7 Bing. 692; *Sackrider v. Beers*, 10 Johns. 241; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 287; *Godd. Easem.* 250 *et pas*.

*Mason v. Hill*, *supra*, was decided in the king's bench in 1833. The court there said:

"The position that the first occupant of water for a beneficial purpose has a good title to it is perfectly true in this sense: that neither the owner of the land *below* can back the water, nor the owner of the land *above* divert it, to his prejudice. In this, as in other cases of real property, possession is a good title against a wrong-doer."

He adds that the owner of a mill, if the stream is obstructed or diverted, may recover consequential damages *to his mill*, (*Rutland v. Bowler*, Palmer, 290;) and to the same effect are some American cases. "But," says Lord DENMAN, in *Mason v. Hill*, "it is a very different question whether he can take from the land below one of its natural advantages, which is capable of being applied to valuable purposes, and generally increases the fertility of the soil even when unapplied, and deprive him of it *altogether* by anticipating him in its application to a useful purpose. \* \* \* We think that this proposition has originated in a *mistaken view* of the principles laid down in the decided cases of *Bealey v. Shaw, supra*; *Saunders v. Newman*,

*supra*; and *Williams v. Morland*, 2 Barn. & C. 915. It appears to us also that the doctrine of Blackstone, and the *dicta* of learned judges in some of those cases, and in that of *Cox v. Matthews*, have been *misconceived*." The court then proceeds to show that neither *Bealey v. Shaw*, nor *Saunders v. Newman*, nor *Williams v. Morland*, nor the *dictum* of Lord Chief Justice TINDAL in *Liggins v. Inge*, nor that of Lord HALE in *Cox v. Matthews*, (when properly understood,) nor the observations of Blackstone, ought to be considered as authority that the first occupant or first person (although a riparian owner) who chooses to appropriate a natural stream, has a title against the owner of the land below, and may deprive him of the natural right to the water. And Lord DENMAN adds that the view taken in *Mason v. Hill* as to the riparian right accords with the law as laid down by Serjeant ADAIR, chief justice of Chester, in *Prescott v. Phillips*, cited in 6 East, 213, by Lord ELLENBOROUGH in *Bealey v. Shaw*, and by the master of the rolls in *Howard v. Wright*, 1 Sim. & S. 190.

It has been suggested that what is said on the subject in *Mason v. Hill* was mere *dictum*, since, it is claimed, that case might have been decided on the theory of "appropriation." The case shows that the question was fairly presented, and was fully, and, in one point of view, necessarily, considered.

*Sackrider v. Beers*, 10 Johns. 241, was an action at law. The defendant had taken water out of the stream, and conducted it by means of a raceway to a point in the stream below the plaintiff's dam. Plaintiff recovered.

In *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282, the plaintiff had fully released to the defendant. The court said the remedy of the plaintiff, if any, ought to be sought at law by an action on the case, or upon the covenants contained in his deed of release.

Goddard, in his *Law of Easements*, (page 251,) declares "that all riparian owners of natural streams have a riparian right to the use of water as it flows past their lands, as long as they do not interfere with the natural rights of other riparian owners, and to sue for disturbance is now an *established doctrine of the law*." He adds: "The doctrine was not *established* until comparatively modern times," etc. He says, after referring to some of the earlier decisions, that the [apparent] theory of appropriation was much modified by various decisions "as the nature of riparian rights was brought more fully under consideration;" citing in this connection *Mason v. Hill*, *supra*, and *Cocker v. Cowper*, 5 Tyrw. 103. He concludes: "Appropriation of the water of flowing streams has thus gradually fallen from being considered the means of acquiring important rights to being deemed of *no importance whatever*." Mr. Angell, however, cites a case of as early a date as 32 Edw. III., where an assize of nuisance was brought by A. against B., for that B. had made a trench from a river, and drawn away thereby a part of the water and stream another way from that in which it did formerly use to run; and the assize passed for

the plaintiff; and it was adjudged that the water should be removed to its ancient channel at the cost of the defendant. Water-courses, 93. See, also, Y. B. 14 Hen. VIII. 31, referred to by Angell.

In *Chasemore v. Richards*, 7 H. L. Cas. 384, Lord WENSLEYDALE declares: "We may consider, therefore, that this proposition is *indisputable*; that the right of the proprietor to the enjoyment of a water-course is a natural right, and is not acquired by *occupation*," etc.

In examining the numerous cases which establish that the doctrine of "appropriation" is *not* the doctrine of the common law we meet an embarrassment of abundance. The authorities referred to under the next head, and many others, clearly hold to the contrary of the proposition contended for by counsel for respondent.

14. *Riparian rights.* By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned.

In the case now here there is no question as to the use of water for propelling machinery. And, in treating of the riparian right at common law, we shall reserve, for the present, the consideration of the effect of the diminution of the flow of a stream, by reason of its consumption by a riparian proprietor, to satisfy what has been called "natural wants,"—its reasonable consumption by cattle, or for domestic uses,—and also the effect of absorption and evaporation by reason of its application to the purposes of irrigation. As to the nature of the right of the riparian owner in the water, by all the modern, as well as ancient, authorities, the right in the water is *usufructuary*, and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus. Ang. Water-courses, § 94, and notes. But the right to a water-course begins *ex jure nature*, and, having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. So say all the common-law text-books, and the decisions. Ang. § 93. *Aqua currit et debet currere ut currere solebat* "is the language of the ancient common law." Id.; *Shury v. Piggot*, Bulst. 339; *Countess of Rutland v. Bowler*, Palmer, 290. "As a general proposition, every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, *without diminution or alteration*." Washb. Easem. 319. "Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as is wont by nature, without material diminution or alteration." Gould, Waters, § 204. Each riparian proprietor has a right to the natural flow of the water-course undiminished, except by its reasonable consumption by upper proprietors.

Ang. c. 4, *passim*. The right to the flow of the water is *inseparably annexed to the soil*, and passes with it, not as an easement or appurtenant, but as a *parcel*. Use does not create, and *disuse* cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right *unreasonably* to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice SHAW in *Johnson v. Jordan*, 2 Metc. 239. The right to the use of water flowing over land is undoubtedly *identified with the realty*, and is a real and corporeal hereditament. *Cary v. Daniels*, 5 Metc. 238. *Prima facie* every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of the river, and has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. Priority of occupancy of the flowing waters of a river *creates no right*, unless the appropriation be for a period which the law deems a presumption of right. Mr. Justice STORY in *Tyler v. Wilkinson*, 4 Mason, 397. Whatever may be said of *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, as bearing on the right to irrigate, it recognizes the riparian right. CRESSWELL, J., says: "It appears to us that all persons having land upon a flowing stream have, by nature, certain rights to the use of the stream, *whether they exercise them or not*, and they may begin to exercise them whenever they will."

It has always been held that a grant of land carries with it the water flowing over the soil. The well-known maxim, *cujus est solum, ejus est usque ad cælum*, inculcates that land, in its legal signification, has an indefinite extent upward. We need not add that rights to the use of water may be acquired by grant, under some circumstances by *assent*, and by adverse user and possession. It is unnecessary to pursue the subject further, or to refer to the many text-books and decisions of the courts in England and in other states which fully support the proposition laid down in the foregoing title, No. 14.

The supreme court of California has not been silent with respect to the subject. "The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes. *Sacket v. Wheaton*, 17 Pick. 105; 1 Cruise, Dig. 39; Ang. 3." *Hill v. Newman*, 5 Cal. 445. By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by *mere diversion*. *Pope v. Kinman*, 54 Cal. 3. The right of a riparian proprietor to have the water of a stream run through his land is a vested right, and an interference with it imports damages. *Creighton v. Evans*, 53 Cal. 55. The riparian right is fully recognized in *Ferrea v. Knipe*, 28 Cal. 340,

where it was held that, although an upper riparian proprietor had a right to the use of a stream for watering his cattle, and for domestic purposes, he had not a right to dam up the creek and spread out the water over a large surface, by which it became lost by absorption and evaporation to an extent which prevented the stream from flowing to the premises of the lower proprietor, such obstruction not being a proper or *reasonable* use of the water. As decided, the judgment in *Hale v. McLea*, 53 Cal. 578, necessarily involved a determination of the question. It was there assumed that a defendant through whose land ran a subterranean stream which continued to the land of the plaintiff, had no greater right to divert the water than if the stream had been on the surface.. This was an assumption *against* the defendant, adversely to whom the case was decided. Mr. Justice CROCKETT says:

"Tested by the rule [as to surface streams] the utmost that can be claimed for the defendant on the facts is that he is entitled to take from the stream as much water as he needs for watering his cattle, and for domestic uses,—such as cooking, washing, and the like,—leaving the surplus to flow to the spring of plaintiff in its natural channel." "If it were a surface stream, the plaintiff would be entitled to have it flow to and across his lands, in its natural channel, subject only to the right of the defendant to use so much of the water as is necessary to supply his natural or primary wants as above indicated." "But the findings show that the defendant has diverted the whole body of the stream through pipes, in such a manner that no portion of the water can reach the spring, and the surplus, at the beginning of this action, was *running to waste*." "There is no question in this case involving the right of a riparian owner to the use of water for the purposes of *irrigation*."

*Hanson v. McCue*, 42 Cal. 303, was decided on the ground that, upon the facts of the case, no defined subterranean channel, with water flowing therein, existed. But both Chief Justice WALLACE and Mr. Justice CROCKETT, who delivered opinions, seem to assume that the rules of law which apply to surface, apply to underground currents flowing in a definite channel; and that, as to surface streams, the right of a riparian proprietor is to have the water flow *ubi solebat*.

15. *By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.*

To decide this appeal it is not imperatively necessary to lay down a rule which shall govern the matter of *irrigation* by riparian owners. By the common law none but riparian owners can employ, or suffer the employment of, the water for any purpose. The defendant here relies entirely on its right to appropriate under the provisions of the Civil Code—a right limited only by the capacity of its canal—the quantity actually appropriated and appropriately applied. It is not averred that the defendant is a riparian proprietor. Neither the statutes of the general government nor those of the state contemplate (if it were possible in fact) appropriations for the benefit of the

United States. They must always be for the benefit of the persons seized of lands, or actually possessed of tracts of the public domain. The defendant's appropriation was "for the purpose of irrigating and supplying with water the lands in the notice of appropriation designated, and lying along the route of said canal." Finding. The notices of appropriation do not describe the tract of land it was the intention to irrigate, nor are the limits of the tracts irrigated described in the findings. There is no suggestion that such tracts, if any there are, belong to or are possessed by the same person or persons, nor any (an important consideration) that the surplus waters were returned to the channel. It is only the tracts next the stream which are riparian lands, and the owners of such tracts are alone riparian owners. Even if the defendant were treated as having received a license from the owner of the tract in which its canal heads, or as being itself the owner of that tract, there is no pretense that the water actually diverted was used to irrigate that particular tract, or that the quantity consumed was necessary or reasonable for that purpose. Nevertheless as, upon a new trial of this action, the question may possibly be presented, we propose to make a few observations upon the doctrine of the common law with regard to irrigation by riparian owners.

Mr. Angell submits whether it may not fairly be deduced from the authorities that for an *essential* diminution of the water of a watercourse, which nature has directed to run in a certain and determinate channel for *any* purpose, the law in this country will not interpose. "So far as the question may be supposed to imply that an upper appropriator may not "essentially" diminish the water by using it for domestic purposes, and for watering cattle, the weight of authority is that he may, if *necessary*, consume *all* the water of the stream for those purposes. Gould, Waters, § 203. Such is the California rule. *Ferrea v. Knipe*, *supra*, and *Hale v. McLea*, *supra*. Indeed, in case of a small rivulet, the necessary consequence of using it at all, by one or more upper owners, for these "natural" or "primary" purposes, must often be to exhaust the water.

Chancellor KENT (3 Comm. 429) is sometimes quoted as proving that water cannot be employed for irrigation, sometimes as proving that it may be. He says:

"Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the general sense of mankind, to debar any riparian proprietor from the application of water for domestic, *agricultural*, or manufacturing purposes, provided the use of water be made under the limitation that he do no *material injury* to his neighbor below him who has an equal right to the subsequent use of the same water."

It seems to us that the foregoing (although a very distinct statement of the general proposition) ought not to be taken literally, unless the words "material injury" be impressed with a signification the equivalent of a substantial deprivation of capacity in a lower proprie-

tor to employ the water for useful purposes. The adjective is prefixed to "injury," and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage as a whole may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietors of water, either for drinking or for agriculture, etc. Undoubtedly, as against an appropriation by a mere wrong-doer, a riparian proprietor may insist upon the entire and complete natural flow of the stream. The employment by Kent of the words "material injury" implies that every diminution is not any injury, and it excludes, where water is reasonably used above for irrigation, mere sentiment, or the consideration of a diminution from the natural flow so far merely as such flow pleases the eye or gratifies a taste for the beautiful. Of course, in ascertaining whether irrigation is reasonable, its effect in depriving the lower proprietor of natural irrigation is to be considered with the other circumstances. Moreover, as we have seen, it is established that, so far as the use for domestic purposes, all the water of a stream may, if *necessary*, be exhausted. In that case the lower proprietor receives none of it, and Chancellor KENT cannot have intended that material "diminution" always means material "injury." *A priori* it would be expected that the decisions in Great Britain and Ireland would not much assist the inquiry, since, owing to the humidity of the climate of those islands, it must rarely happen that any use for irrigation can be *reasonable*; and for any purpose the use must be reasonable, the maxim which every riparian proprietor is bound to respect being *sic utere tuo ut alienum non lædas*. The question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially *injured* by the diminution,—injured by not receiving the benefit in due proportion of the enjoyment to which he and the other proprietors are entitled. It is obvious that the use of water for the purposes of irrigation always involves some loss by evaporation and absorption, and must often result in a sensible and clearly perceptible reduction of the quantity in the channel. An entire diversion of a water-course by an upper riparian proprietor, (or a diversion of a part of it.) for irrigation, without restoring to the channel the excess of the water not actually consumed, is never allowed. Whether or not a *diversion* of water is reasonable is a question not so much as mentioned by any writer or judge. The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the *exclusion* of the proprietors below,—a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights. *Van Hoesen v. Coventry*, 10 Barb. 518-522.

In *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, the court said that the detention for the purposes of irrigation was, under the circumstances of that case, necessarily injurious, the effect being *wholly to prevent* the natural course of the stream for a certain number of hours.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, the lords seem to refer with approbation to the "American" doctrine of irrigation.

*Embrey v. Owen*, 6 Exch. 352, decides that the use of water by a defendant for irrigation was no injury to the plaintiff, a mill-owner, in fact or law. There the irrigation took place only at intermittent periods when the river was full, etc. But in delivering his opinion, PARKE, B., after quoting from KENT, said:

"In America, as may be inferred from this extract, and as is stated in the judgment of the court of Exchequer in *Wood v. Waud*, a very liberal use of the stream for the purposes of irrigation, and for carrying on manufactures, is permitted. So, in France, where every one may use it '*en bon pere de famille, et pour son plus grand avantage*.' Code Civil, art. 640, note *a*, by Pailliet. He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood v. Waud* it was observed that in England it is not clear that a user to that extent would be permitted; nor do we mean to lay down that it would *in every case* be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon *the circumstances of each case*. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of *degree*, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."

And in the same case the learned judge said:

"It was very ably argued before us by the learned counsel for the plaintiffs that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed, and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a *right*, and, if continued, would be the foundation of a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition with respect to every description of right. Actual, perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right, in which case the law will presume damage. *Injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White*, 2 Ld. Raym. 938, by Lord HOLT, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice STORY in *Webb v. Portland Manuf'g Co.*, 3 Sum. 189. But

in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them. The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright v. Howard*, 1 Sim. & S. 190, followed by *Mason v. Hill*, 3 Barn. & Adol. 304, and 5 Barn. & Adol. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748, and is fully settled in the American courts. See 3 Kent, Comm. 439, 445. The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See 5 Barn. & Adol. 24. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state. If it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, *subject to the similar rights* of all the proprietors of the bank on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will."

Professor Washburn (Easem. 234) refers "to two or three recent English cases" where the subject of irrigation is considered, and where the courts take occasion to speak of the American cases with approbation, etc.

Gould (citing in the notes many English and American decisions) writes, (Gould, Waters, § 217:)

"The right of a riparian proprietor to divert the waters of a stream for the purpose of irrigation is recognized in England and generally in this country. According to the later decisions in both countries this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable, and must not materially affect the *application* of the water by other riparian proprietors. The *extent* of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land, abutting on one part of the stream, could not lawfully irrigate such land *continually* by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for the purpose. If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance *above it*, or returned at a distance *below it*, *this* would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion. So, a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the water for such purpose *excessively*, and without returning the *surplus* into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded, or to another proprietor below who only uses the water for *irrigation*, and is deprived of *that right* to an *unreasonable extent*."

WESTON, J., in *Blanchard v. Baker*, 8 Me. 253, observes:

"A riparian proprietor may make a reasonable use of the water itself for domestic purposes, for watering his cattle, or even for irrigation, provided it is not unreasonably detained, or *essentially* diminished."

In *Gillett v. Johnson*, 30 Conn. 180, BUTLER, J., speaks of the right of a defendant to irrigate as *limited*:

"She was bound to apply the water in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle. The claim of the defendant was that she had a right to divert *the whole* for the purposes of irrigation regardless of the rights of the plaintiff. *Such* diversion was unreasonable, and therefore illegal."

And in *Arnold v. Foot*, 12 Wend. 330:

"The defendant has a right to use so much as is necessary for his family and cattle, but he has no right to use it for irrigating his meadow, if he thereby deprives the plaintiff of the *reasonable use* of the water in its natural channel."

The supreme court of Massachusetts has said:

"Every man through whose land the water passes may use it *for irrigating his land*; but he must so use it as to do the least possible injury to his neighbor, who has the same right." *Anthony v. Lapham*, 5 Pick. 175.

In *Newhall v. Ireson*, 8 Cush. 595, Chief Justice SHAW says:

"Even [in cases which *Newhall v. Ireson* does not necessarily overrule] where it has been considered that a riparian proprietor had authority to make use of a stream for purposes of irrigation, and thus, by that use, divert a portion of it, it has been held, under the condition, that such diversion was, under all the circumstances, a *reasonable use* of the stream, and that the *surplus* of the water thus used must be returned into its natural channel."

The same learned judge and luminous writer has very fully considered the matter of irrigation in *Elliot v. Fitchburg R. Co.*, 10 Cush. 193-195:

"This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose land it passes, as are held to apply to other water-courses, subject to this consideration: that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream just sufficient to furnish water for domestic uses, for farm-yards, and watering-places for cattle. The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in water-courses passing through or by their lands. It presupposes that the diversion of *any portion* of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right. The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris*, of such character that while it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made *than a just and reasonable use*, it cannot be said to be wrongful or *injurious* to a proprietor lower down. What is such a just

and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is therefore, to a considerable extent, *a question of degree*; still, the rule is the same: that each proprietor *has a right* to a reasonable use of it for his own benefit, for domestic use, *and* for manufacturing and agricultural purposes.

"It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes; yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, *wholly* abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the *substantial benefits* which they might derive from it if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, while the other would nearly deprive him of the whole beneficial use, and yet in both the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175.

"This rule that no riparian proprietor can wholly abstract or divert a water-course, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream *is common to all the riparian proprietors*, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor *for taking any portion* of the water of the stream for any purpose. Such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it. *Colburn v. Richards*, 13 Mass. 420. It would also follow, as the legal and practicable result, that no proprietor could have *any beneficial use* of the stream without an encroachment on another's right, subjecting him to actions *toties quoties*, as well as to a forcible abatement of the nuisance. If the plaintiff could, in case like the present, have

such an action, then every proprietor on the brook to its outlet in Nashua river would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimac river to the ocean. This is a sort of *reductio ad absurdum* which shows that such *cannot be the rule*, as was claimed by the plaintiff."

In *Evans v. Merriweather*, 3 Scam. 496, the supreme court of Illinois said:

"The use must be a reasonable one. Now, the question fairly arises, is that a reasonable use of running water by the upper proprietor by which the fluid is entirely consumed? To answer the question satisfactorily it is proper to consider the wants in regard to the element of water. These wants are either natural or artificial. Natural, are such as are absolutely necessary to be supplied in order to his existence; artificial, such only as, by supplying them, his comfort and prosperity are increased. To quench thirst and for household purposes water is absolutely indispensable. In civilized life water for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of a man's artificial wants is not necessary to his existence; he could live if water was not employed in irrigating his lands or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is indispensable for the cultivation of the soil, and in these water for irrigation would be a *natural want*."

There can be little doubt, under the authorities, that for a riparian proprietor entirely to consume water (except ordinarily for domestic uses, etc.) is to use it unreasonably, as is said in *Evans v. Merriweather*, and that was the question involved in that case. The distinction between natural and artificial "wants" seems to be derived from a distinction previously recognized, and which has sometimes been designated as a difference between the use of water for "ordinary" and "extraordinary" purposes. Thus, Lord Kingsdown, in *Miner v. Gilmour*, 12 Moore, P. C. 156, said:

"By the general law applicable to riparian proprietors, each has a right to what may be called the ordinary right of a use of water flowing past his land, —for instance, to the reasonable use of the water for domestic purposes, and for his cattle; and this, without regard to the effect that such use may have, in case of deficiency, upon the proprietors lower down the stream. But, further, he may have the use of it for any purpose, or *what may be deemed* the extraordinary use of it, provided he does not thereby interfere with the *lawful use* of it by other proprietors, either above or below him. Subject to this condition, a riparian proprietor may dam up a stream for the purpose of a mill, or divert the water for the purpose of *irrigation*. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts on them a sensible *injury*."

The real difference here pointed out between the classes of uses is that, as is assumed, water may be used for *ordinary* purposes, without regard to the effects of such use, in case of deficiency below, while with reference to extraordinary uses the effects on those below must always be considered in determining its reasonableness. Lord Kingsdown's "instances" indicate that he was using them as illustrations of the relative importance of the uses by him mentioned. It

may perhaps be doubted whether an arbitrary classification can be made which is applicable everywhere where the common law prevails. Even the use of water of a stream for *potation* may not be of paramount importance, when the stream is small, and the particular proprietor is amply supplied with water for such purpose by living springs independent of the creek; and it may happen, all the conditions being considered, that the exhaustion of an entire stream by large bands of cattle ought not to be permitted. Or, indeed, it might be that a flouring-mill would be of more relative consequence than the cultivation of the ground. See *Escriche* with respect to riparian rights in Mexico. This last, however, is hardly a supposable case since the general introduction of steam as a propelling power. The distinction between natural and artificial "wants" would be, under supposable conditions, somewhat fanciful. The urging and pressing necessity of a particular use as distinguished from another, may itself depend on circumstances. We cannot say that it is always reasonable, in a "hot and arid climate," to elevate irrigation to the rank of primary use, to which drinking usually belongs. If that should be adopted as the uniform rule, the upper proprietor might perhaps exhaust all the water for irrigation to the entire exclusion of those below him,—“a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights.” *Van Hoesen v. Coventry*, *supra*. The reasonable usefulness of a quantity of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances.

We anticipate the objection that this is not an absolute rule at all, but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor for irrigation cannot be laid down. A stream may be so small that any use for irrigation may deprive all the others of any like use, and the same may be true of a larger stream, where the use is by several of a large number of proprietors. The effect might be that while there might be sufficient water to supply several for irrigation, there would not be enough for all, and so all might be deprived of the benefit. But the private interests of all would in most cases, if not in every case, lead to an avoidance of the supposed evil. It is not to be doubted that the riparian proprietors would settle by convention upon a plan by which each could secure a reasonable use for irrigation purposes; as by authorizing each to stay the flow at recurring periods, or otherwise distributing it for their mutual and common benefit. The right of the riparian proprietors to a reasonable use of the water of the stream for purposes of irrigation is recognized in many of the California cases hereinbefore referred to, and in *Anaheim Co. v. Semi-trop. Co.*, 64 Cal. 185.

16. *On behalf of the defendant certain witnesses gave testimony tending to prove that, after the commencement of the action and issue joined, and during the trial of this action, there was no water-course as claimed, and no channel through which water could have flowed. The court erred in rejecting evidence, offered by the plaintiffs in reply, tending to prove that after the dates mentioned by said witnesses for defendant there was a water-course and channel.*

The court below found, as its findings are construed by both parties, that no water-course (connected with Kern river or otherwise) runs by or through any of the lands of the plaintiffs. We cannot say but there was a substantial conflict with respect to that matter, and in accordance with the established rule, must affirm the judgment and order, unless at the trial the court erred in rejecting or admitting evidence bearing, or claimed to bear, on the question of the existence of the water-course.

The court below refused to permit the plaintiffs to introduce certain evidence, after the defendant had closed, on the ground that the same was merely cumulative.

One exception saved by the plaintiffs related to an offer of testimony as to a place spoken of as "De Weber Road-crossing." With regard to that exception we think it may fairly be argued from the record that the defendant introduced evidence tending to prove there was no channel at any point where the De Weber road crosses the swamp, at a time several years before the commencement of this action; but we also think that the plaintiffs had already given evidence that at the time, and subsequent to the time, mentioned by defendant's witnesses, the De Weber road did cross a channel. We cannot say, therefore, that the court erred in refusing to permit further evidence in reply with respect to that matter.

The plaintiffs, in making out their case, introduced witnesses who stated that at various times prior to the diversion of water by the defendant they had passed along Buena Vista slough, and that there was a channel throughout its alleged length. As to several of these witnesses it might be questioned whether their inspection was not broken and interrupted. Crocker said that, as he passed along, the channel was in places concealed from his vision; McCrary, that the slough or channel existed at each section line; Still, that he had crossed through *nearly* every quarter section of the swamp. In argument, however, counsel for plaintiffs have insisted that in opening their case they proved a continuous slough from Buena Vista lake to Tulare lake, not merely as an inference from its existence in different places, but as a physical object, visible to their witnesses from one lake to the other. Assuming, as claimed by plaintiffs' counsel, that some of their witnesses pursued the alleged slough throughout its entire length, viewing each and every portion of it, it would be difficult to say on what principle plaintiffs could demand the absolute right, by way of reply, to contradict the declarations of witnesses for

the defendant that, at or about the times when the plaintiffs' witnesses had stated there was a channel from Buena Vista lake to a point below the plaintiffs' lands, there was in places *no* channel between the lake and that point.

Defendant called as witnesses Murray F. Taylor and others, who testified that, after the commencement of the action, and after answer filed herein, and the trial was commenced, they had passed from one side to the other of the swamp (avoiding disconnected sloughs and ponds) without crossing a channel. Plaintiffs offered to prove by McCrary that he subsequently ran a certain line through portions of township 27 S., range 22 E., and "what natural objects" he found on the line he ran. As no witness on the part of the defendant had testified with respect to such a line in the township named, the court properly sustained an objection to the offer.

But the plaintiffs also offered in reply to show by the witness McCrary "that at each one of the lines where the witnesses for defendant testify they have crossed, not only has this line been run where they testified to, but that the line has been run by this witness from one-half a mile to three-quarters of a mile on each side of that line, and that an examination has been made between these lines as to all channels and natural features of the country between the lines on each side of the line," etc.; and plaintiffs offered to prove the same things by Mr. Harrold, "who accompanied McCrary," and by Huntley, Beard, Noble, and others. Defendant might have insisted on the offer being made more definite; that plaintiffs' counsel should *name* the witnesses whose testimony they intended to rebut, and specify the exact fact they disputed; as, the fact that there was no channel where defendant's witnesses crossed. The offer to prove by McCrary, "in case he found sloughs or channels, or anything of that kind, they were leveled, and their width ascertained," did not absolutely exclude the idea that he found no slough or channel. But no such specific objection to the offer was made, and it sufficiently appears from the transcript that both the learned judge (who ruled that the offer was of cumulative testimony) and counsel understood the evidence on the part of the defendant against which the *offer* was directed.

The defendant's witness McMurdo testified that in April, 1881, (after suit brought and answer,) there was no water flowing at points in the alleged slough above the lands of the plaintiffs; and his testimony tended to prove that at the same time no water was flowing, and no channel existed, at another point also above such lands. After defendant rested plaintiffs offered to prove that within 30 days prior to June 1, 1881, the witness McCrary, with Beard and Huntley, had gone from Headquarters (a place above the points where McMurdo had stated no water flowed) *in a boat* to the Bonestell House, which is below certain lands of the plaintiffs. Taylor, Jastro, Cross, and Barker, witnesses for the defendant, testified to crossing the swamp on the fourteenth of April, 1881, (after the commencement of this

action,) and to the absence of a channel on the route they pursued. One Estee conducted the party from a point near his house, on the west side of the swamp, to the Round corral, near the east side. Estee was not examined by the defendant. In reply the plaintiffs called him, and asked: "What did you see when making that crossing as regards sloughs or channels?" The court sustained an objection to the question, and the plaintiffs excepted to the ruling. Witnesses for defendant, McMurdo and Fillebrown, testified to the running of a line (after the trial had commenced) across the body of swamp land, ascertaining levels along that line, and to the making of a profile of the same. They also testified that in running the line they came to a pond which constituted no part of a continuous slough or channel, but was without inlet or outlet. One G. W. Smith was called by plaintiffs, who testified that he followed the same line; that he also came to a pond, as to which there was evidence tending to prove it was the pond mentioned by defendant's witnesses, to which there was both inlet and outlet. Other offers, similar in character, were made by plaintiffs, to which defendant objected. To the ruling of the court sustaining the objection of defendant to the several offers plaintiffs duly excepted.

We think the first question presented by these rulings may fairly be stated thus: Defendant gave evidence tending to prove that, during the trial, there were places along the line of the alleged slough and channel where there was in fact no channel,—breaks in the continuity. The question to be considered is not modified by the claim of respondent that the effect of its evidence was to establish the absence of any channel through which the water was wont to flow, and to prove that, on the extraordinary occasions when the water came into the slough, it soon ceased to flow in a defined channel, but spread throughout the swamp. If the water did not flow with regular periodicity, or if, flowing periodically, it had no defined channel, (other than the whole swamp,) the plaintiffs had no cause of action,—in the first case, because there was no water-course; in the second, because there was no such water-course as described in the complaint; and perhaps, also, because the plaintiffs, being owners only of swamp lands, (even conceding the water in the swamp might constitute a stream,) were owners merely of the bed of the stream, and were not riparian proprietors. Gould, Waters, 148; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; S. C. L. R. 10 Ch. 679. But the testimony, to contradict which the offers of the plaintiffs were made, was testimony that the swamp land had been crossed on divers lines without the persons so crossing it coming into contact with any defined channel, or distinct evidences of such. There may be a continuous water-course through a body of swamp lands. The plaintiffs had given evidence tending to establish the existence of such a water-course. The evidence of defendant was to establish that there was no such water-course by proof that there was none at places where its witnesses

crossed the swamp. That such testimony tended to prove, or, if true, proved that there was no water-course touching the plaintiffs' lands, is not an objection to the counter-testimony offered. Testimony in reply is directed against the precise facts testified to by defendant's witnesses, not against the inferences which may be drawn from them. The witnesses testified that they crossed the swamp on certain lines, and found no channel. Did the court err in disallowing the offer of plaintiffs to prove that at such places there was in fact a channel at or subsequent to the times mentioned by defendant's witnesses?

All agree that it is within the discretion of the trial court to admit additional evidence in support of the plaintiffs' case after the defendant has rested. Of course, it is always safer to admit evidence claimed to be in reply, if the court entertains doubt of its admissibility. Nevertheless, the respondent here has a right to insist that it is for the appellants to point out plain error in the rejection of evidence. The rules as to the transfer of the burden of proof are not always determinative of the rules as to testimony in reply. The burden of proof is shifted by every species of evidence strong enough to establish a *prima facie* case. 2 Best, Ev. 473. But this only means that there is a necessity of evidence to answer the *prima facie* case, or it will prevail. *Heinemann v. Heard*, 62 N. Y. 455. A party on whom is the affirmative cannot reserve a portion of his evidence until the opposite party has exhausted his evidence to negative that offered in the first instance. Tayl. Ev. § 386. Questions as to the admissibility of evidence in reply, offered by the plaintiff, arise ordinarily where the answer consists of denials of the affirmations of the complaint. Where the answer avers new matter which it is for the defendant to prove, evidence on the part of the plaintiff to meet the evidence given by the defendant in support of his affirmative plea is not given in reply or "rebuttal," as the term is used in this connection. Rebutting testimony is addressed to evidence produced by the opposite party, not to his pleading.

It seems, indeed, at one time to have been held in England that when two pleas were tendered—as the general issue, and another plea of affirmative matter constituting a defense—the plaintiff was compelled to prove in advance the non-existence of the affirmative matter. Lord ELLENBOROUGH held the general rule to be, "where, by pleading or by means of notice, the defense is *known*, the counsel for the plaintiff is bound to open his whole case in chief, and cannot proceed in parts." *Rees v. Smith*, 2 Starkie, 31; *Delauney v. Mitchell*, 1 Starkie, 439. The practice seems long to have been settled in the English courts, however, that where the general issue is pleaded, and the plaintiff is also notified of a special defense, he has his option to give all the evidence he intends to offer to rebut the averments of the special plea or notice in the first instance, or to give none of such evidence, and to reserve all to be given in reply. *Browne v. Murray*, Ryan & M. 254. In this country the right of the plaintiff to reserve all his evi-

dence, to meet the evidence of the defendant in support of his special or affirmative plea, has always been recognized. And so, where the plea or answer consists of denials alone, under which, however, affirmative matter is provable which may constitute a defense, the plaintiff is entitled to rebut the defendant's evidence of such affirmative matter. In a note to *Greswolde v. Kemp*, Car. & M. 635, the reporters say:

"One test whether the plaintiff is entitled to call witnesses in reply to the defendant's proofs seems to be whether the defendant's defense is disclosed by the plea. \* \* \* He cannot reasonably be called on to give contradictory evidence by anticipation of proof which the defendant might never give, or which, if given, the plaintiff could not foresee."

As was said by BRONSON, J., in *Hollister v. Bender*:

"The substance of the allegation to be tried, rather than the particular form of the pleading, must determine where the *onus* lies; particularly where the defendant is not required to plead the particular matter on which he intends to rely." 1 Hill, 153.

In that case the action was *assumpsit*; the plea *non-assumpsit*, under which, by the New York practice, the defendant, without actually controverting the promise, might prove payment, release, accord, and satisfaction, etc. If, said Judge Bronson, any of these defenses were pleaded specially, the defendant would clearly have the affirmative of the issue, "and the burden of proof is the same when the defense is affirmative matter sought to be proved under a denial of the promise." The rule is not that the plaintiff must anticipate all evidence that may be admitted under the denials of an answer. The rule assumes that evidence may be admitted which he cannot reasonably be expected to anticipate.

Mr. Croswell, in his note to section 469, Greenl. Ev. (14th Ed.), says:

"There is considerable conflict in the decisions in regard to the order of proof and the course of trial in the different states. In some of the states the party is only required to make a *prima facie* case in the opening, and may reserve confirmatory proof in support of the very points made in the opening till he finds upon what points his opening case is attacked, and then fortify it upon those points. *Clayes v. Ferris*, 10 Vt. 112. But in this state [Massachusetts] the defendant must put in all his evidence in the first instance, and the plaintiff in his reply is confined to fortifying those points in his case which are attacked by defendant. And, in some of the states, it is understood that this process of making and answering the plaintiff's case is allowed to be repeated an indefinite number of times; but at common law the plaintiff puts in his whole evidence upon every point which he opens, and the defendant then puts in his entire case, and the plaintiff's reply is limited to new points first opened by defendant."

Investigation shows that the preponderance of authority is in favor of what Mr. Croswell calls "the common-law rule," and it has never been suggested that any other rule obtains in California. The rule has been expressed in different terms by writers and judges. Mr. Croswell says the evidence to rebut may be confined to "new points

first opened by the defendant." Mr. Taylor states it negatively. Ev. § 386.

In *Hastings v. Palmer*, COWEN, J., said :

"Strictly speaking, the plaintiff or party holding the affirmative is bound, in the first instance, to introduce all the evidence on his side, except that which operates merely to answer or qualify the case as it is sought to be made out by his adversary's proofs." 20 Wend. 225.

And Starkie wrote :

"After the defendant has adduced his evidence the plaintiff's counsel at once proceeds, without any observations, to tender any evidence he may have in reply; but this must be confined by negating specific acts sworn to by defendant's witnesses which he could not be expected to have anticipated." Ev. (10th Ed.) side page 609.

We are brought back to the proposition that where the plaintiff is not informed by the answer of new matter which constitutes a defense he is entitled to adduce evidence in reply to the evidence given to establish such matter. It is admitted that it is no objection to evidence in reply to an affirmative defense that it may strengthen the plaintiff's original case, and upon just principles, it would seem that if the new matter offered by the defendant may constitute an affirmative defense, the plaintiff is not precluded from replying to it, because such new matter may also have a tendency to weaken or negative plaintiff's case as originally presented.

A water-course has been said to consist of "bed, banks, and water." The water need not flow continually, but it would seem the flow must be periodical,—such as may be expected during a portion of each year. It must be made to appear that the water usually flows through a regular channel with banks or sides. Ang. § 4. It may be conceded that it was for the plaintiffs here to establish a natural stream, flowing at least periodically, up to the time of the diversion; and that to justify a permanent injunction the court must have been satisfied that the water would have continued to flow except for the diversion. The court would be authorized to deny the decree prayed for if the evidence showed that the channel proved to exist when the diversion occurred had disappeared (and ceased to exist) as the result of natural causes, and not as a consequence of any acts of the defendant, or of interference by others.

Evidence that there were no indications of a channel at a certain date would, perhaps, tend to prove that there was no channel at a previous date. But, unless we can say as *law* that the channel could not have gone out of existence, such evidence would not establish conclusively that the channel never existed; nor would it create the disputable presumption that "a thing once proved to exist continues as long as is usual with things of that nature." Code Civil Proc. 1963. The presumption that a thing existing in the present existed at any time in the past, if it could be considered to be a presumption, would be the reverse of the Code presumption. The effect of the evidence

must, of course, depend upon the permanent or transitory nature of the thing itself. Apply the Code presumption to the case before us. Let us suppose a water-course was proved at or before the commencement of the trial. The disputable presumption is that it continued "as long as is usual with things of that nature." We cannot say how long a channel for water will continue.

It is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. The law cannot fix the limits of variation in these and other particulars. As was said, in effect, by CURTIS J., in *Howard v. Ingersoll*, 13 How. 428, the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, "like other natural objects, to be sought for and found by the distinctive appearances it presents." Whether, however, worn deep by the action of water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation, or otherwise rendered perceptible,—a channel is necessary to the constitution of a water-course.

Of course we cannot judicially declare that a channel is of such a nature that it can never cease to exist. Both the evidence and findings herein show that, as a result of the action of water, channels have been closed and new channels formed. We cannot say but the *indications* of a channel may be removed by other natural forces. We can conceive that along the course of a stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the lowest portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being *withdrawn*, the "distinctive appearances" that it had ever flowed there would soon disappear.

Causes are ordinarily tried with reference to the condition of things prior to and when an action is commenced. The pleadings (except supplemental) relate to that date, and the evidence is confined to the averments or denials of the pleadings. A plaintiff seeking the peculiar relief here sought, must satisfy the court that, unless the injunction be made perpetual, he will be deprived of water in the future. But the continuation of the *status quo* at the commencement of the action is an *inference*. The plaintiffs here were not bound to prove by independent evidence that the channel continued to exist after suit brought. The issue was, had they a cause of action when the suit was commenced? If they had, it was because of conditions existing when the water of Kern river was diverted, and when they commenced their proceedings; and this is none the less so because, in order to secure the decree they prayed for, the conditions must be such as would authorize the court to infer that they would continue

in the future. The inference would always have to be drawn, whether educed from facts proved to exist prior to suit brought, or from facts existing at the time of the trial. It was not the duty of plaintiffs, under the pleadings, in the first instance, to prove the continued existence of a channel after the action was begun, except so far as it might be implied from its existence previously. Even, therefore, if the evidence of the defendant as to the absence of a channel at times after the action, and after the trial was commenced, be treated merely as evidence tending to prove its non-existence before, the plaintiffs were not bound to anticipate it by contradictory proofs. The pleadings gave no notice that such evidence would be offered.

But the evidence given by the defendant also tended to prove that the channel, or the distinctive appearances of it, had ceased. It is not *impossible* that they had ceased between the dates testified to by the plaintiffs' witnesses and those of the examinations made by the witnesses for the defendant. If the channel had so ceased to exist, that fact would constitute an affirmative defense. The defense was not pleaded in terms, and, as the evidence tended to prove that a channel had never existed, it was admitted without objection. That fact ought not to deprive the plaintiffs of their right to reply to the new matter constituting an affirmative defense, of which the answer had not informed them. They could not reasonably have been expected to anticipate that the defendant would offer evidence of new matter of which the answer did not give them notice. Further, the testimony of certain witnesses for the defendant was not merely to the bald fact that there was no channel at a certain time. The facts to which they testified were that, on an occasion, they passed from one side to the other of the lands through which the slough had been said to run without crossing or coming to any slough or channel. The court refused to permit the plaintiffs, in reply, to produce evidence tending to prove that on the occasion referred to the defendant's witnesses *did* meet with a slough or channel. Thus, the defendant having called some of those who made the trip together, the court rejected the plaintiffs' offer to call another of the same party to contradict the statement of those examined by the other side. It is difficult to distinguish this from the other offers made; but it presents the question sharply. In this instance there can be no possible doubt that the offered testimony related to the matter testified to by the witnesses for the defendant.

Our conclusion is that the court below erred in sustaining the defendant's objections to offers of evidence, with respect to the existence of a slough or channel, made by plaintiffs after the defendant had rested.

17. *The court below erred in rejecting all or some of the certificates of purchase offered by the plaintiffs in reply.*

In their amended complaint the plaintiffs allege:

"That plaintiffs were, at the commencement of this action, the owners in fee, seized and possessed (and for more than a year theretofore they and their grantors were such owners) of all those lands situate in the county of Kern, in the state of California, and particularly described (according to the surveys by the authority of the United States of America, and referred to the Mount Diablo base and meridian) in a certain schedule which is hereto annexed, marked 'Schedule M,' and made a part of this complaint; that said lands are swamp and overflowed lands, and as such belonged to the state of California until the year 1876 and later, in which year, and at various times afterwards, and before the commencement of this action, they were granted by the state to the plaintiffs and their grantors."

The action was commenced September 2, 1880. In its answer to the amended complaint the defendant avers:

"That heretofore, to-wit, on or about the fourth day of May, A. D. 1875, defendant's grantors, acting in the full faith and *bona fide* belief that a large portion, to-wit, more than seventy-four thousand (74,000) inches, measured under a 4-inch pressure, of the waters of said Kern river were unused, vacant, unappropriated, and free and open to appropriation and use, posted a certain notice of appropriation of water on the north bank of said river, in Kern county, state of California, at a point on or about the south-west quarter of section thirteen, (13,) in township twenty-nine (29) south, range twenty-seven (27) east, Mount Diablo base and meridian, according to the United States surveys; wherein they claimed, and whereby they notified, plaintiffs, plaintiffs' grantors, and all persons whomsoever it might concern, that they claimed and appropriated, and proposed and intended to take out and divert, use, and consume, a large part and portion, to-wit, seventy-four thousand (74,000) inches, measured under a 4-inch pressure, of the flowing waters of said Kern river, for the purpose of irrigating certain lands in said notice described, and of supplying thereunto and thereon for other purposes in said notice set forth; that within ten days after the posting of said notice, to-wit, on the fourth day of May, A. D. 1875, the said notice was duly recorded in the office of the county recorder of said Kern county, in Book 1 of Water Rights, page 37, to which said record reference is here made, and which said record is made a part hereof; that defendant's said grantors thereby appropriated and acquired the said amount of flowing waters of said Kern river, with the right to take out, divert, use, and consume the same for the uses and purposes in said notice mentioned, all of which appropriations, rights, and properties they, (defendant's said grantors,) on, to-wit, the eighteenth day of May, A. D. 1875, granted, bargained, and sold, transferred, assigned, and conveyed, to this defendant; that within twenty days after the posting of said notice as aforesaid, to-wit, on or about the — day of May, A. D., 1875, defendant, for the purpose of utilizing said waters of Kern river, in the manner and at the places in said notice mentioned, commenced the construction of that certain ditch or canal known as the 'Calloway Canal,' and being the same as in said complaint described, and thereafter and thenceforth defendant continuously and diligently prosecuted the work on said canal until the same was completed, and expended thereon, and in the construction thereof, large and vast sums of money, amounting in the aggregate, to-wit, ninety-thousand (\$90,000) dollars; that during the construction of said canal defendant diverted and used the aforesaid amount of water in irrigating and fertilizing the lands in said notice described, and for stock and other beneficial purposes on said described lands, and defendant has continued so to use said amount of water from and after the completion thereof."

At the trial, the plaintiffs, as part of their evidence in chief, produced patents from the state of California granting to the plaintiffs

or their grantors certain of the lands described in the complaint. The several patents are dated January 18, 1876, February 17, 1876, September 11, 1876, and June 15, 1877. And the plaintiffs also gave in evidence the judgment roll in an action brought by the *People of the State of California v. John Center and others*, by the judgment in which action it was decreed that the plaintiffs herein have certain of the lands described in the complaint in the present action, and that they were entitled to patent for the same as provided in "An act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," approved March 20, 1878. The decree in the said action (*People v. Center*) was entered September 17, 1878.

We are about to consider whether the court below erred in rejecting, when they were offered by plaintiffs, all or any of the certificates of purchase issued by the state land-office to assignors of the plaintiffs. The court below held that there was *no stream*. As we have seen, however, the court erred in refusing to admit certain evidence bearing on that issue. In deciding the question as to the admission of the certificates we must assume that there was evidence of a stream running from Kern river to some of the lands described in the complaint, and to a tract described in at least one of the certificates. It does not follow, however, that all the certificates would in any event have been admissible. It is to be borne in mind that if the court below had found a water-course to, through, or past any one or more of the tracts described in the complaint, only such of the certificates of purchase would have been admissible as showed the purchase of tracts so found by the court to be touched or traversed by the water-course. If at the trial the court found, on sufficient evidence, that no water-course existed, or that none of the lands described in the complaint bordered on it, and had committed no error with respect to the admission of evidence relating to these matters, it is very clear that no material error would have been committed by rejecting all of the certificates of purchase. It is asserted by counsel for respondent that, in any view of the case, no evidence was given tending to prove that the stream ran through or touched the lands described in any of the certificates of purchase offered, except one. If the court erred in rejecting one of the certificates, the consequence, so far as it should influence the action of this court, is the same as if all were erroneously rejected. But in case there shall be a retrial in the superior court, it is perhaps important, and it is certainly proper, to limit any general statement in such manner as that it may be made applicable to the evidence as it shall be presented to that court when the case shall be retried. If we shall say, in general terms, that the certificates of purchase ought to have been admitted, this must be understood in a limited sense, and to apply only to the certificates with reference to the lands described, when there is evidence that they are lands by or through which the water-course passed. All the sections or fractional

sections mentioned in any one certificate constitute a single tract of land. If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can operate by relation (for the purpose of this suit) to the date of those certificates *only*, the lands described in which border on the stream.

The defendant having given evidence to prove the matters so as aforesaid pleaded in its answer, the plaintiffs, as evidence in reply, offered *certificates of purchase*, dated September 30, 1872, for sections and portions of sections (being part of the lands described in the complaint) in township 25 S., range 21 E.; portions of sections in township 26 S., range 21 E.; sections and portions of sections in township 25 S., range 22 E.; sections and portions of sections in township 26 S., range 22 E.,—each of said certificates being signed and issued by the register of the state land-office, and the same appearing to have been canceled by issuance of patent; also like certificates for portions of the lands described in the complaint, one dated February 5, 1877, and three, March 2, 1874. By the first section of the act of March 27, 1872, "to put in effect the provisions of the Civil Code relative to water-rights," title 8 of part 4 of division 2 of the Civil Code went into full force and operation on the first day of May, 1872. St. 1871-72, p. 622. All the certificates of purchase above mentioned were therefore issued after the title of the Civil Code became operative.

It is manifest that if, as contended by counsel for *appellants*, the state is a "riparian proprietor" within the meaning of section 1422 of the Civil Code, the defendant could acquire no rights to water by appropriation, as against the grantees of the lands from the state, even as against those who became such after the appropriation was made. But, in that case, no injury was done to the appellants by the rejection of all the certificates of purchase, since the appellants, as part of the evidence in chief, had given in evidence their patents issued after the appropriation. In order, however, to meet inferences which may be drawn from the assumption that the state is a "riparian proprietor," within the meaning of the section, it is proper to consider that matter. It is urged by counsel that the title of the Civil Code only relates to the right to appropriate waters upon public lands of the United States, the same right growing out of priority of appropriation, recognized by the courts for many years past, and recognized and confirmed by the acts of congress of 1866 and 1870; that the state, in the exercise of its police power, and of a trust assumed on its part, has only regulated the conduct of its subjects, going on lands of the United States, (under an implied or express license,) with reference to this matter of appropriation. It is admitted the state may give the right to appropriate water on its lands, but it is contended the state has not done so, and, on the contrary, has reserved the rights of all riparian proprietors, of whom it is one.

The grant however is general. "The right to the use of flowing water, etc., may be acquired by appropriation." Civil Code, 1410. No class of lands is mentioned from which water may be diverted, yet, as to its lands, the *United States* is a riparian proprietor. True, the *United States* had already recognized the right of appropriation on its lands; but if the acts of 1866 and 1870 had never been passed, it cannot be doubted that section 1422 of the Civil Code would have been held *not* to apply to public lands of the *United States*. This would have been necessary to give effect to the title, and to carry out the apparent intention of the legislature, in the light of the history of the country to which reference has been made. Thus, by implication, the *United States*, as a riparian proprietor, is excluded from the benefit of the section. "The rights of riparian proprietors are not affected by the provisions of this title." Civil Code, 1422.

The citizens of the state have never been prohibited from entering upon the public lands of the state. The courts have always recognized a right in the prior possessor of lands of the state as against those subsequently intruding upon such possession. The same principle would protect a prior appropriator of water against a subsequent appropriator from the same stream. It is not important here to inquire whether, as against a subsequent appropriation of water, a prior appropriator of land, through which the stream may run, would have the better right. It is enough to say that, as between two persons, both mere occupants of land or water on the state lands, the courts have determined controversies. The implied permission by the general government to private persons to enter upon its lands has been assumed to have been given by the state with reference to the lands of the state; and the state, for the maintenance of peace and good order, has protected the citizen in the acquisition and enjoyment on its lands of certain property rights obtained through possession,—perhaps the mode by which all property was originally acquired. In view of these facts, we feel justified in saying that it was the legislative intent to exclude as well the state as the *United States* from the protection which is extended to riparian proprietors by section 1422 of the Civil Code.

We have elsewhere had something to say with reference to the class of persons whose rights are protected by section 1422. For the present, we shall assume that it includes those who may become riparian proprietors at any time before an appropriation of water is actually made in accordance with the provisions of the Civil Code. Assuming this, the certificates of purchase above mentioned were admissible in evidence if the other certificates, which were of a date anterior to the enactments of the Civil Code, were admissible.

To the introduction of each of the certificates of purchase, when offered, counsel for defendant objected on the grounds that it was "irrelevant, immaterial, and not proper testimony in rebuttal." It has been suggested that the plaintiffs were precluded from showing

title in themselves prior to 1876, by reason of their allegation in the complaint "that the lands belonged to the state of California until the year 1876 and later." If they were estopped by that allegation, they would have been equally estopped if the certificates had been offered as part of their evidence in chief. But we think they were not so estopped. The lands are swamp lands, and are alleged to have been granted by the state. If the averment had not been inserted that the lands belonged to the state up to the grants, the presumption would have been that they belonged to the state up to the date of the patents, or, at least, up to the initiation of the proceedings which ended in patents. Yet, notwithstanding the presumption, the plaintiffs would have been entitled to prove that *they* owned them at a date previous to that at which the complaint alleges they became the owners. The averments are, in effect, that the lands belonged to the state until they were granted to plaintiffs. The dates of the grants, as pleaded, are immaterial, if they were in fact granted before the diversion of water. As to the averment of previous ownership by the state, it is an averment of a fact of which we would take judicial notice, and may be disregarded. If the complaint had simply stated that the plaintiffs had become the owners at a certain date, by virtue of grants, would it be an objection to the admission of a grant of an earlier date that the state then owned the lands? Under our system that which the law presumes need not be alleged, and, if alleged, ought not to determine the rights of parties, unless the presumption, independent of the allegation, would determine them.

The certificates, in connection with the patents, would have been admissible as part of plaintiffs' evidence in chief under the averment of ownership in fee. In connection with the patents, they would have proved a title to every intent, as against the state and its grantees, as of the dates of the certificates.

In *Union Mill v. Dangberg*, 2 Sawy. 450, HILLYER, J., said:

"It is settled that the entry and payment, and certificate thereof, convey the equitable title. Thereafter the land ceases to be public, and the government has no right to sell it again, but holds the legal title in trust for the purchaser. \* \* \* As possessors and equitable owners they (the holders of certificates) are entitled to enjoy *all the incidents* to the land and its ownership, as well as the land itself. The patent, when issued, relates back to the original entry,—the inception of the title,—so far as is necessary to protect the purchaser's title to the land." *Gibson v. Choteau*, 13 Wall. 92; *Gilman v. Lockwood*, 4 Wall. 410; *Hughes v. U. S.*, Id. 232; *People v. Shearer*, 30 Cal. 648; *Carroll v. Safford*, 3 How. 441.

The certificates offered by the plaintiffs herein were evidence of a right of entry by the assignors of the plaintiffs, and of the receipt by the state of *part* of the purchase money; in the last respect differing from certificates issued to pre-emptioners under the laws of the United States, which evidence the receipt of the whole of the purchase money. The right to the possession might have been terminated by a failure to pay the balance of the purchase money; but the patents issued

when the certificates were canceled proved payment of the balance of the purchase money, and related to the dates of the certificates. The certificates and patents would have proved that plaintiffs and their assignors had been entitled to the possession of the lands in law and equity from those dates. They certainly would have shown them to have been the owners, so far as the fact of ownership could have been made the basis for relief in an action like the present.

There can be no doubt but the equitable owner in possession of a tract of land bordering a stream is entitled to relief in a court of equity against the wrongful diversion of water of the stream. Even at law, as between parties claiming under patents from the general or state government for the same land, the junior patent will prevail if the proceedings to secure it were commenced before those culminating in the senior patent. Here the plaintiffs have patents which relate back to the certificates, (the contracts of the plaintiffs and their assignors having been fully performed,) so as to protect them in their title to the lands, with all their incidents. Assuming that the rights of these parties are to be determined by the decision of the question, did the plaintiffs acquire a right to their lands *before* the defendant appropriated the waters? the patents of the plaintiffs related to the certificates of purchase as against the defendant's appropriation.

Inasmuch as a sale of lands includes a sale of the corporeal hereditament,—a right to the flow of the water,—it is clearly the intention of the statutes providing for sale of the state lands that the purchaser shall be protected from a deprivation of any of the valuable incidents of ownership until he shall lose his right to purchase by failure to complete his contract,—to reserve and withdraw such lands from the privilege according to appropriators to divert waters from state lands. To hold otherwise, and so to construe the Code as that he who has made part payment for land, and entered into possession under a contract with the state guarantying to him a complete title in case he shall pay the balance, can be deprived of the benefit of that which is a valuable incident of ownership, (notwithstanding he shall subsequently have fulfilled his contract according to its terms,) would operate manifest injustice. We are not now speaking of the power of the state. Doubtless, it may sell its lands with such limitations as it may deem proper. But if the Code provisions, and the statutes providing for the disposition of state lands, can be held to mean that the purchaser shall have riparian rights as against subsequent appropriators, it would lead to iniquitous results to construe the provisions in such manner as that he shall not secure the benefit of those rights in case he performs his contract; in other words, that his patent shall not relate to his certificate of purchase.

So far as the certificates merely tended to prove title in the lands at and prior to a wrongful diversion of water by defendant they were not admissible *in reply*. Proof that they were owners at the time of

the diversion complained of—that is, the diversion which occurred after they became owners as alleged—was part of their original case. The plaintiffs were fully informed by the answer that defendant relied upon a right to appropriate water acquired from the state prior to the dates of the patents. But that was an affirmative plea, the averments of which it was for the defendant to establish. If when the plaintiffs rested they had proved title by patent, the existence of a water-course running through the lands, and diversion by defendant subsequent to the patents, they had proved *their case*, not merely *prima facie*, but conclusively, in the absence of proof of the affirmative matter set forth in the answer. They were not bound to disprove in advance the appropriation pleaded. Having made out, or attempted to make out, their case in the first instance, the plaintiffs would not have been entitled, in contradiction of evidence given on the part of the defendant, under the denials of the answer that the plaintiffs were not the owners at the time of the alleged diversion, to produce further evidence in support of their title. But, after the defendant rested, the plaintiffs were authorized to meet the evidence in support of the plea that the water was appropriated by evidence that the waters were never legally appropriated, by the defendant. If the waters could be appropriated, as against the lands described in the complaint, only while they remained the lands of the state, then evidence that, when the appropriation was made, the lands were *not* the lands of the state was admissible, and none the less admissible because it also proved that the plaintiffs or their assignors were then the owners. Such evidence was not evidence in reply to new matter proved under the denials of the answer, but was evidence relating to an issue made by the plea of the defendant, an issue as to which the defendant had the affirmative. It was evidence which, by every interpretation of the rule, the plaintiffs had a right to reserve until after the defendant had closed.

It has been suggested that the plaintiffs gave some evidence in chief tending to prove their *possession* prior to the appropriation. We are not aware that the English rule, which at one time prohibited a plaintiff, in case he gave any evidence tending to negative an affirmative defense in the first instance, from giving further like evidence in reply, was ever enforced in this country or *in equity*. Moreover, the mere prior occupation of lands of the state can constitute no reason for preventing the diversion of water flowing through them by one expressly authorized by the state to divert the water from the occupant.

In opposition to these views, and as adjudications that the certificates of purchase, and possession under them, gave the plaintiffs no riparian rights, and that the certificates, as against the defendant, were not evidence even *prima facie* of the payment of any portion of the purchase money, the counsel for respondent cite *Smith v. Logan*, 1 Pac. Rep. 678; *Covington v. Becker*, 5 Nev. 281; *Lake v. Tolles*,

8 Nev. 285; *Brewer v. Hall*, 36 Ark. 351; *Lansdale v. Daniels*, 100 U. S. 118; *Megerle v. Ashe*, 33 Cal. 84; *Smith v. Athern*, 34 Cal. 506; *Daniels v. Lansdale*, 43 Cal. 41; *Osgood v. Water Co.*, 56 Cal. 574.

It is suggested that the certificates were not even *prima facie* evidence of the receipt of any money by the state as against the defendant, alleged to be a stranger to the contract. But if, by reason of the fact of the payment of one-fifth of the purchase money by the assignors of plaintiffs, the issuance of the certificates, and the entry thereunder, the assignors of plaintiffs acquired riparian rights, the defendant is not a grantee of the legal title of the waters from the state. Even if it should be conceded that, in a suit for specific performance by a vendee against the grantee of his vendor's title, the vendor's receipt for part of the purchase money from his vendee would not be evidence against the grantee, the analogy is not perfect. Here there is no specific grant to the defendant to divert the water. It claims to have acquired the right to take it by taking it. The laws of the state are to be read together. Statutes provide for the sale of the lands, and the mode by which the title can be acquired by individuals. They are to pay 20 per cent. of the purchase price, and then a certificate issues. On the payment of the balance, within a certain time, the purchaser receives a patent. As against the state the certificate is evidence of the receipt of certain moneys; it is also evidence of the right of possession. The state has done no act indicating a purpose to transfer to another its right to the balance of the purchase money, or its duty, upon the receipt thereof, to convey the legal title. If a certificate is obtained without the previous payment of the 20 per cent. it is for the state by proper proceeding to annul the certificate. While the contract of purchase is recognized by the state authorities as alive, the water of a stream flowing through the land cannot be diverted by a mere appropriator, because it is the intent of the statutes that the water shall not be so appropriated. The rights of appropriators are all subject and subordinate to those of persons with whom the officers of the state may have previously dealt as purchasers of lands, and recognized as such by delivery of certificates of purchase. All lands thus contracted for are reserved from the effect and operation of any appropriation of water until failure of the purchaser to complete his payments, the completion whereof can be proved by patent issued within the time limited by law. It remains with the state to determine whether the purchaser of the land has complied with his contract, and whatever is recognized as sufficient evidence of such compliance by the state is sufficient evidence against one attempting to appropriate water after the purchaser of the land has been let into possession, as shown by a certificate of purchase.

In this view the cases cited have little bearing on the question we are considering. This is not merely a case of two persons claiming to derive by patent from the same source, between whom the prior

equity prevails. The defendant had an absolute right to divert the water when it appropriated the flow, or it had no right. The plaintiffs would have had no equity after paying for the land in full (had patents been refused) on which they could follow the legal title to the flow of the waters into the hands of the defendant, and have a trust decreed. They would have no right, legal or equitable, arising out of their ownership of the lands to divert the waters outside of their own lands, or to demand from another a conveyance of such right. The effect of holding that a valid diversion of water from the lands could be made after part payment therefor, and certificate, would be to deprive them of the moneys paid, or of the benefit of the water, which may have been a principal inducement to the purchase.

It may be said that the purchaser knows that he is liable to have the water diverted by a subsequent appropriator when he makes his payment. But the matter of notice cannot determine the right or be conclusive of the proper interpretation of the statutes. If construing the statutes one way, the purchaser has notice when he makes the first payment that the water may subsequently be diverted, it is also true, construing the statutes the other way, the appropriator has notice that the land has been contracted and partly paid for. In the one case, however, the purchaser has already parted with value; in the other, the appropriator has expended nothing prior to the purchase and part payment by the purchaser. Assuming, as has been assumed thus far, that the statutes do not authorize the diversion of water from lands which shall have passed into the absolute ownership of private persons, it is equally clear their purpose is to protect the flow of water to lands contracted for and partly paid for under the laws of the state.

In *Smith v. Logan*, *supra*, cited by respondent's counsel, it seems to have been held that one in possession of land, under an unexecuted contract for the sale thereof, cannot assert the rights of a riparian proprietor in an adjoining stream. In that case it appeared that the land was owned in fee by another private person, who had contracted to sell it to a defendant in the suit. The supreme court of Nevada said: "The contract is unexecuted, and the conveyance depends on the performance by Logan of the obligations imposed upon him. Since he has not acquired the fee, it is obvious that the doctrine of riparian proprietorship cannot be invoked in his behalf." When water is diverted from land an injury is done to the possession, and ordinarily it is sufficient if the plaintiff shows he has the possession as against a mere wrong-doer. Gould, *Waters*, 476. But inasmuch as it here appears that the fee was in the state when the diversion commenced, the mere possession of state lands would not be sufficient to establish a right to the water in plaintiffs, as against one authorized by the state to appropriate. It became necessary, therefore, for the plaintiffs to establish that they had acquired the right to the possession from the state. Did the contracts of their assignors with the

state, and their entry and possession, show this? The plaintiff in such cases is not bound to prove the same rule as he alleges, "for the disturbance is the gist of the action, and the title is only the inducement." Gould, Waters, 478, and cases cited in note. He need not prove the precise title to the land was alleged, but must prove that he is entitled to the water. If he has acquired the right to the possession of the land from the state, even although he may hold it subject to the right of the state to deprive him of the possession if he shall not satisfy a deferred payment, it would seem that he is entitled to the enjoyment of the flow of the stream as an incident to his possession. One subsequently diverting water from the land cannot defend his acts by proving that the plaintiff is not the owner in fee, although entitled to the possession as against the legal owner and third parties. But if this were doubtful when the legal title is in another private person, here, as we have seen, it is the evident intent of the statutes that those placed in possession of lands under contracts made with the state shall not be deprived of flow of the water by mere appropriators while the right to the possession shall continue in the purchaser as against the state.

It would seem to have been held in *McDonald v. Bear River Co.*, 13 Cal. 220, that a contract of purchase and possession under it constitute an equitable estate, with the present right to the enjoyment of all its incidents. There the whole purchase price had been paid. Of the other Nevada cases cited by counsel for respondent, *Covington v. Becker* holds that, upon public lands of the United States, the prior appropriator of water has the better right as against a subsequent appropriator of the same stream. In *Lake v. Tolles* the plaintiff was a riparian proprietor, holding under a United States patent. The defendant had a bare possession of unsurveyed public lands higher up on the stream. It was decided that the defendant had no riparian rights, and could not dispute the plaintiff's right to the water. In the Arkansas case it was held that a mere certificate of the swamp-land commissioners of that state that the applicant "has this day applied to purchase" a designated tract imported in itself no contract. *Megerle v. Ashe* that, as against a prior patent from the state of lands as school lands, (500,000-acre grant,) a subsequent patentee from the state may introduce evidence that he had acquired a prior pre-emption right; but, to overcome the state patent, must prove that he filed his declaration after the plat of the survey had been filed in the office of the United States register. In *Smith v. Athern* the established rule is repeated:

"At common law, and under our mode of procedure, in case of conflicting patents to land from one paramount source, the court, in actions of ejectment, will look behind the patents, and ascertain which party had the prior equity; and when ascertained, it will attach itself to the legal title, which, by relation, takes effect at the time the equity accrued; and thus a junior patent, founded on a prior equity, will prevail over an elder patent founded on a junior equity."

*Lansdale v. Daniels* asserts the principles laid down in *Smith v. Athern*, that the prior equity must prevail, and applies it in a case where, in an action to recover the possession of lands, the defendant filed a cross-complaint alleging prior equities. Upon the facts of that case, however, it was held that the plaintiff had both the prior patent and the prior equity. *Lansdale v. Daniels* merely adjudges that the filing of a pre-emption declaration before the surveyor general has filed his plat of survey is premature, and a nullity. *Osgood v. Water Co.* presented a question of priority between an appropriator of water on lands of the United States and a pre-emptioner. It was there held that, by reason of the express language of the seventeenth section of the act of congress of July 9, 1870, amending the act of July 26, 1866, the rights of the pre-emption claimant as against an appropriator, date only from his patent or certificate of purchase.

It is not necessary here to inquire whether the section of the amendatory act of 1870, referred to in *Osgood v. Water Co.*, should be read distributively, so as to mean that all patents thereafter issued, or pre-emptions thereafter "allowed," (or proved up and paid for,) should be subject to water-rights previously acquired under, or recognized by, the act of 1866. The right of appropriation, which is the basis of defendant's claim, so far as it may affect land of the state or its grantees, is to be derived from some law of the state. *Osgood v. Water Co.* construes statutes of the United States; and no one of the decisions cited by counsel interprets the statutes of the state bearing upon the question of water-rights, or determines the relative rights of those deriving title to lands from the state and appropriators of water.

It is contended by defendant, however, that from the time the title of the Civil Code relating to water-rights went into operation, no grantee of state lands has any "riparian rights;" that title went into operation on the first day of May, 1872. St. 1871-72, p. 622. If this be so, the certificates hereinbefore mentioned as having been issued subsequently to that date were properly rejected.

The bill of exceptions shows that plaintiffs also offered in evidence certificates of purchase issued prior to 1872; but if the proposition of defendant's counsel be correct, the certificates last mentioned were not admissible *in reply*, because they would have tended to make out an entirely new case. The plaintiffs were obliged to prove, in the first instance, that they were entitled to the relief prayed for; that they were the owners or entitled to the exclusive possession, by right derived from the state, of the lands through which the stream flowed; and that defendant had diverted water from *their* lands. If, by their evidence in chief, they entirely failed to prove that they were entitled to have the water flow to their lands—and they did so entirely fail if their patents, issued after the provisions of the Code took effect, gave them no right to the water,—they could assert no claim to prove facts on which their whole case depended, after the defendant had rested. It was necessary to inquire, therefore, whether the provisions

of the Civil Code from the time they took effect (May 1, 1172) operated to deprive subsequent grantees of state lands, intersected or bordering on streams, of all the rights known as "riparian rights." Such is the contention of defendant, and it includes the proposition that section 1422 of the Civil Code only protects riparian rights already acquired when the title of the Code went into operation. For convenience, we have treated the question presented in an earlier place in this opinion. We have there endeavored to show that section 1422 of the Civil Code saves riparian rights to those receiving grants of state lands subsequent to the enactment of that section. *Ante*, title 11. Assuming this, the court below erred in excluding the certificates of purchase.

For errors mentioned in foregoing titles (Nos. 16 and 17) a new trial should have been granted by the court below.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKEE, J.; SHARPSTEIN, J.; THORNTON, J.

ROSS, J., (*dissenting*.) I dissent for the reasons given in my dissenting opinion filed when the case was last under consideration. 4 Pac. Rep. 929.

MORRISON, C. J., (*dissenting*.) I dissent for the same reasons.

MYRIC, J., (*dissenting*.) I dissent from the judgment, and from the views of the majority of my associates, as to riparian rights, for two reasons:

1. I do not think that the adoption of the common law of England, by the act of the legislature of this state of April 13, 1850, was intended to or did establish a rule of decision as to the right of appropriation of water for irrigation. The land of the birth of the common law of England had no occasion to consider or act upon the necessity for irrigation, and appropriation was not within the scheme of its laws. The rights of riparian owners (whatever they were) had reference to the country and its needs, of which irrigation was not an essential part. The point decided in *St. Helena Water Co. v. Forbes*, 62 Cal. 182, had reference to the right of condemnation; no question as between riparian rights and the right of appropriation was considered or involved.

2. The plaintiffs in this case are not in position to claim an absolute right to the flow of water over or through their lands. The "Arkansas Act," so called, was applied to this state by the act of congress of September 28, 1850. That act, in substance, is as follows: To enable the state of California to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation were granted to the state. The lands were to be listed;

and, on the issuance of a patent, the fee-simple to said lands should vest in the state, subject to the disposal of the legislature: provided, the proceeds of said lands should be applied exclusively, so far as necessary, to the purpose of reclaiming said lands by means of levees and drains. The only title of plaintiffs to the lands in question was acquired under the "Arkansas Act," and the acts of the legislature of this state passed in pursuance thereof. Therefore they cannot deny that the lands were either swamp lands or overflowed lands, and were therefore unfit for cultivation. Neither can they deny the right of the legislature as owner, or as the law-making power, to adopt such means by levees or by drains as might to it seem necessary or fitting to reclaim the lands. The lands were either "swamp lands," (spongy land; low ground filled with water; soft, wet ground; marshy ground away from the sea-shore. Web. Dict.,) or they were "overflowed lands,"—lands covered with water. The lands were granted to the state because they were in a condition of nature, unfit for cultivation, and for the purpose of having them reclaimed. The state became proprietor, with the obligation on its part to adopt the necessary means to that end. This could be done either by levees or drains,—in any way to keep off or draw off the water. After the grant of congress, and before the title of plaintiffs accrued, while the state owned the lands, the state, *as proprietor*, initiated a system of appropriation of water. The natural result of that system, applied to the waters of Kern river, would be to reduce the body of water flowing to the lands of plaintiffs, thus measureably accomplishing the object of the grant. It will not do to say that the plaintiffs acquired a right to the lands before the appropriation by defendant, and that by such acquisition the state lost control as "proprietor," because, by the terms of the grant, the lands were to be reclaimed. The plaintiffs could obtain no right or title to the lands without such right or title being subject to the power of the state to direct the method of reclamation. The proposition that lands which, in a state of nature, were soft, spongy, overflowed, and, in consequence thereof, were unfit for cultivation, and were granted for the purpose of having the water kept off or drawn off, have attached to them the right to have all water flow to them which in the course of nature would flow, is, in my opinion,—with, I hope, proper respect for the views of those entertaining contrary opinions,—not so clearly established as it ought to be in order to entitle plaintiffs to recover.

I agree with my associates that the court below erred in its ruling as to the evidence offered by plaintiffs in rebuttal, but, if I am correct in the views above expressed, the error was immaterial.

(69 Cal. 456)

**FEDER v. EPSTEIN and others. (No. 9,108.)**

Filed April 27, 1886.

**PARTNERSHIP—ACTION AGAINST, IN FIRM NAME.**

An action "against Samuel Epstein and Wolf Epstein, partners under the firm name of Epstein Brothers, defendants," is not an action against the associates by their common name, but is a suit against the members in their individual names, notwithstanding an averment in the complaint that the defendants "have been and now are partners under the firm name aforesaid."

**Commissioners' decision.**

Department 2. Appeal from superior court, city and county of San Francisco.

*J. H. Shankland and Flournoy, Mhoon & Flournoy, for appellant.*

BELCHER, C. C. This was an action to recover the value of certain goods, wares, and merchandise alleged to have been sold and delivered to the defendants. The complaint was entitled "Moses M. Feder, plaintiff, against Samuel Epstein and Wolf Epstein, partners under the firm name of Epstein Brothers, defendants." It was alleged that the defendants "have been and now are partners under the firm name aforesaid," and the prayer was for "judgment against said defendants," etc. The summons had the same title as the complaint, and then followed: "The people of the state of California send greeting to Samuel Epstein and Wolf Epstein, defendants;" and it concluded with a notice that, if the defendants failed to appear and answer the complaint, the "plaintiff will take judgment against you," etc. The sheriff returned that he served the summons "on Epstein Brothers, by delivering to Samuel Epstein, one of said defendants, personally, in the county of Ventura, a copy of said summons," etc. Samuel Epstein failed to appear and answer, and a judgment of default was entered against him.

The plaintiff then moved the court to amend the judgment so as to make it a judgment against the firm of Epstein Bros., and to be enforced against the joint property of the firm, as well as against Samuel Epstein and his separate property. The court denied the motion, and the plaintiff has appealed from the order.

We see no error in the ruling. The associates were not sued by their common name, but by their individual names, and the case was therefore not within the provisions of section 388 of the Code of Civil Procedure. *Davidson v. Knox*, 7 Pac. Rep. 413. The judgment, as entered, was authorized by section 414 of the Code; and, if not deemed sufficient, proceedings may be taken to have the other defendant bound by it. Sections 989-994, Code Civil Proc.

The order should be affirmed.

We concur: SEARLS, C., FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

v.10p.no.9—50

## SUPREME COURT OF OREGON.

(13 Or. 362)

## OLDS v. CARY and others.

Filed April 21, 1886.

## 1. PLEADING—DEMURRER—ANSWERING OVER—DEFECTIVE COMPLAINT CURED BY VERDICT.

Where the complaint, in an action upon an undertaking which was given upon the obtaining of an injunction, and was conditioned upon the injunction being wrongful, or without sufficient cause, states merely that the injunction had been issued and had been dissolved, such complaint is objectionable, upon demurrer, in not stating that the injunction was wrongful, or without sufficient cause; but it is good after verdict, and the party demurring waives the objection to it by answering over.

## 2. INJUNCTION—COUNSEL FEES FOR DISSOLVING.

While reasonable counsel fees, incurred in dissolving a provisional writ of injunction, may be allowed as damages, yet where an injunction is the sole relief sought by the suit, counsel fees for defending the entire action cannot be allowed in any view of the law upon the subject.

Appeal from Yamhill county.

*T. N. Strong*, for appellants, *W. B. Cary* and others.

*W. D. Fenton*, for respondent, *James H. Olds*.

THAYER, J. The respondent commenced an action in the court below against the appellants, upon an undertaking executed by them in a suit which had theretofore been begun in the said circuit court by the appellant Cary against the respondent, to enjoin him from interfering with a certain inclosure in which a crop of wheat was growing; and wherein the said appellant, in order to obtain a provisional writ of injunction, executed the undertaking as principal, and the appellant Holladay executed it as surety. The undertaking was to the effect that the appellants would pay all costs and disbursements that might be decreed to the respondent, and such damages, not exceeding the sum of \$500, as he might sustain by reason of the injunction if the same were wrongful or without sufficient cause. It was alleged in the complaint in the action in which the judgment appealed from was obtained that a writ of injunction duly issued in said suit; and that, upon the hearing thereof, it was dissolved by said circuit court, and that the court decreed to the respondent his costs and disbursements therein taxed at \$93.80, which the appellant Cary paid, and that the decree dissolving the injunction had become final; that by reason of the granting of the injunction, and the continuance thereof to its dissolution, the respondent was compelled to employ and pay, as attorney's fees to procure the dissolution of it, the sum of \$150; and that he sustained other damages set out in the complaint. The appellants filed a demurrer to the complaint, which was overruled, and thereupon answered over. The issues were tried by jury; and upon the trial thereof the respondent's counsel, in order to sustain the said allegation of the complaint, as to the employment and payment of

the attorney's fees, gave evidence tending to prove that he employed certain attorneys to defend the suit, and paid them \$100 cash, and executed his note for \$50. The evidence was objected to by the appellants' counsel, but the court overruled the objection, and an exception was taken to the ruling. The jury returned a verdict for the respondent, supposed to include said \$150, and upon which the judgment appealed from was entered.

Two questions are raised by the appellant's counsel upon the appeal. The first is that the complaint was defective in not alleging that the injunction was wrongful, or without sufficient cause; the second one, that the court improperly overruled the objection to the admission of the evidence regarding the employment and payment of attorneys in the suit.

The objection to the complaint, I think, was well taken. The fact that the injunction was wrongful, or without sufficient cause, should have been alleged. The dissolution of it by the court was evidence of its being wrongful, and should have been introduced as evidence, and not alleged as the substantive fact. A moment's reflection will convince an attorney that this view is correct. The objection was evidently good upon demurrer, though I do not think that the complaint was fatally defective. I think it was good after verdict, and that the appellants waived the objection to it by answering over. If they had stood upon their demurrer, however, they would have been able to insist upon the point in this court; but, under the circumstances, I think the error was cured. The defect was in the statement, and not in the cause of action, and could therefore be waived by going to trial upon the merits. This I believe is an elementary principle.

The second question is more serious. It is very doubtful whether, upon principle, attorney's fees can be recovered in any action, beyond the amount allowed by law, unless expressly stipulated, though in almost all the adjudged cases they are allowed, in actions upon injunction bonds or undertakings, as a part of the damages, if it is ascertained that the injunction was wrongful. High, Inj. says:

"The allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that defendant has been compelled to employ aid in ridding himself of an unjust restriction, which has been placed upon him by the action of the plaintiff." 2 High, Inj. § 1686.

It is held in nearly all the states that such an allowance is proper, as a part of the damages incurred in consequence of the injunction. The supreme court of the United States, however, has taken a different view of the subject, and holds that it is not supported by "the analogies of the law and sound public policy." *Oelrichs v. Spain*, 15 Wall. 211-231. And the Arkansas courts hold to the same doctrine. *Oliphint v. Mansfield*, 36 Ark. 191; *Patton v. Garrett*, 37 Ark. 605.

If the injunction in this case had only been ancillary to the principal object of the suit, and the respondent had taken steps to have it

dissolved, I should have no hesitancy in holding, upon the weight of authority, that reasonable counsel fees, incurred in obtaining a dissolution, could be recovered as a part of the damages; but here the injunction was the sole relief sought by the suit, and, although the employment of counsel to defend it was to get rid of the provisional writ, it was also to defeat the suit itself, and in the latter case no such item of damages could be allowed upon any principle, as the right to institute and prosecute the suit was entirely independent of the provisional remedy. The object of the preliminary injunction was to stay the threatened acts of the respondent during the pendency of the suit; and any expense it occasioned him as the direct result of the restraint, or in order to rid himself of it, might be a proper subject of indemnity, but he would necessarily have to defend the suit in any event, and ought not to recover damages incurred for counsel fees on account of that, any more than if no provisional injunction had been granted. In *Behrens v. McKenzie*, 23 Iowa, 333, it was held that a reasonable compensation for legal services in procuring a release of the injunction might be recovered as damages in an action on the bond; but that it would not allow attorney's fees for services in defending the entire action, but alone for procuring the dissolution of the writ, or releasing the property from its operation.

There is evidence in this case showing that a motion was made, in the suit, to dissolve the temporary injunction, but was denied; and under the rule laid down in *Andrews v. Glenville Woolen Co.*, 50 N. Y. 283, the expenses of that motion, and a counsel fee on the trial, might have been allowed in the action. That would have been more just than to allow all the charges of counsel in the case. Our Code, however, does not fix any counsel fee, while the New York Code, I believe, does. The main difficulty lies in the inability to apportion the expense incurred in the suit, for counsel fees. If it could be ascertained what part of the services rendered by the counsel employed by the respondent, for which he paid the \$150, were rendered upon the dissolution of the injunction, and what part were rendered in defending the suit, an equitable adjustment of the matter could be very easily arrived at. The respondent, if allowed anything for the expense of counsel in the suit, should only have been allowed the extra or increased expense which the suing out and obtaining the writ of injunction occasioned; but how this could have been arrived at in this case without an arbitrary apportionment by the court I am unable to discover. It is evident that the respondent incurred some extra expense on account of attorney's fees in consequence of the injunction, which he probably should have been indemnified for, but that he should recover the entire charge of his attorneys for managing his defense to the suit would be unreasonable in any view we might take as to the law upon the subject.

The respondent's counsel contended that, as the injunction was the sole relief sought in the suit, the rule was different; that in such a

case the entire amount paid for attorney's fees was recoverable. But I do not think this view correct. It is not reasonable to require a party, because he obtained a writ of injunction staying the defendant in the suit from doing the threatened acts during its pendency, to pay the defendant's attorney's fees for defending the suit. The defendant was put to that expense in consequence of the suit, and not on account of the temporary injunction. *Bustamente v. Stewart*, 55 Cal. 115, is conclusive upon that point. The party in such case must show that he was put to extra expense for attorney's fees on account of the injunction, in order to recover. In *Wallace v. York*, 45 Iowa, 81, it was held that the plaintiff might recover for the services of counsel in preparing a motion to dissolve the injunction, and affidavits to sustain it, if made in good faith, although in fact the motion was not passed upon by the court until final hearing. That is as far, I think, as courts should go in such cases. The extra expense occasioned by the issuance of a preliminary writ cannot, in the nature of things, extend to any other matter, and the respondent in this case should only have been allowed counsel fees for preparing and making the motion to dissolve the injunction, the amount of which, I should judge, from the subject-matter of the suit, and amount of entire charges for attorney's fees, could not have exceeded \$50.

A new trial must be had, unless the respondent remit \$100 of the amount of his recovery, with the amount of interest allowed by the judgment upon that sum since such recovery. The costs and disbursements upon appeal must be taxed to the respondent.

## SUPREME COURT OF COLORADO.

(9 Colo. 100)

BOHM v. BOHM.

Filed March 26, 1886.

## 1. STATUTE OF LIMITATIONS—WHEN STATUTE BEGINS TO RUN—TRUSTS.

Where persons occupy fiduciary relations, such as a son, who is business manager for his mother, it cannot be said that the statute of limitations begins to run as soon as the son fails to perform a parol agreement, the mother having perfect confidence in him.<sup>1</sup>

## 2. SAME—WHEN APPLICABLE—TRUSTS.

Where a son persuades his mother to convey land to him, promising to reconvey a portion thereof, but the promise is never reduced to writing, equity will not allow such a transaction to stand, even though the statute of limitations would otherwise act as a bar, and will admit parol evidence to establish said promise.

Appeal from superior court, city of Denver.

The plaintiff below, Mary Bohm, filed a complaint against the defendant, Magdalena Bohm, alleging the ownership and possession of plaintiff to 12 blocks of lots in Bohm's subdivision of the city of Denver; that she claimed title in fee thereto, but that said defendant claimed an estate or interest therein adverse to the title of the plaintiff. The complaint denies the validity of defendant's claim upon said premises; prays that she be required to set forth the nature of her claim; that plaintiff's title be adjudged valid, and that defendant be forever enjoined from asserting any claim of title to the said premises. The answer and cross-complaint of Magdalena Bohm alleges ownership in fee by the defendant on the fourth day of January, 1878, of a tract of land, embracing 80 acres, a parcel of which was and is the premises described and claimed by the plaintiff; that said tract of land was then incumbered by two deeds of trust executed to secure the aggregate sum of \$3,000 and interest; that defendant was then, as now, a widow; that she was without means to remove the said incumbrances, and was, at the date aforesaid, induced to execute to her son, Charles Bohm, a deed of the entire tract of land in fee, in consideration of his promises, upon which she relied and acted, that he would, upon execution and delivery to him of such conveyance, execute and deliver to said defendant a written declaration of trust to the effect that she held an undivided one-third interest in said entire tract of land, free and clear of all liens and incumbrances, and in the proceeds thereof in case of sale. One of the foregoing allegations is in the words following: "And the said Charles Bohm then and there, in consideration of such conveyance to him, and for the purpose of obtaining the legal title to said tract of land from the

<sup>1</sup> For a full discussion of the question of the statute of limitations, and when it begins to run, and herein of frauds, trusts, resultant, constructive, and implied trusts, and the like, see *German Savings & Loan Soc. v. Hutchinson*, (Cal.) 8 Pac. Rep. 627, and note, 628-641.

defendant herein, agreed with and promised the defendant that he would, upon the execution and delivery to him of said conveyance, execute and reduce to writing a declaration of trust," etc., setting out the verbal agreement; that in consideration of the two-thirds of said tract vesting in said Charles Bohm absolutely, by said deed, he promised that he would assume, pay, and remove all liens from the said tract of land, and that, upon demand, he would execute and deliver to the defendant said one-third interest in said tract of land, free and clear of all liens and incumbrances.

Then follows an averment that said Charles Bohm, on the fifteenth day of December, 1883, executed to the plaintiff, Mary Bohm, a deed of the land in the complaint described, and of blocks 1, 2, 3, 4, and 5, in Bohm's subdivision of the city of Denver, which is the only conveyance under which the plaintiff claims. Following this is an averment that, at the time of this conveyance, plaintiff was the wife of the said Charles Bohm; that the conveyance was without consideration; and that before, and at the time of said conveyance, the plaintiff knew of the terms, conditions, and promises upon which the conveyance from defendant to Charles Bohm was made; consequently the plaintiff took the conveyance burdened with the trust.

Defendant alleges that Charles Bohm, intending to cheat and defraud her out of her interest in said land, failed and refused to execute the declaration of trust, although defendant frequently demanded that he execute the same within three years of the filing of the cross-complaint, and prior to the conveyance to the plaintiff; also that defendant frequently, since said conveyance to the plaintiff, demanded of the plaintiff a conveyance to her of an undivided one-third of said property, or a declaration of trust that the plaintiff held the undivided one-third interest in said land in the complaint described in trust for the defendant, which she always refused to make. The death of the said Charles Bohm is averred; that since the land was conveyed to the deceased deeds of trust upon the land have been executed; that the plaintiff has sold a large part of said entire tract of land, realizing therefrom the sum of \$3,900, no part of which sum has been paid to the defendant, although defendant has demanded the one-third part thereof since the said sale. The defendant in the cross-bill avers that the relations between her and the said Charles Bohm, now deceased, and between her and the plaintiff, Mary Bohm, were such as to quiet all suspicions as to any intention on the part of either the plaintiff or the said Charles Bohm to defraud her of any of her rights in the premises; and that it was not until about the time of the said conveyance from Charles Bohm to plaintiff (and within three years of the time of the filing of the amended cross-complaint) that either the said Charles Bohm or the plaintiff refused to execute the declaration of trust, or that she discovered that they, or either of them, intended not to execute such declaration, but to defraud her of her rights in the premises. Said Magdalena Bohm avers that she is a widow, and is inex-

perienced in business matters; she always looked to and relied upon her said son to aid her in the transaction of her business, as one in whom she had a right to and could repose the utmost confidence. The prayer of the cross-bill is that the plaintiff be declared to hold an undivided one-third interest in the parcels of land in the complaint described, free and clear of all liens and claims, in trust for the defendant; that plaintiff be ordered to convey to the defendant, by a good and sufficient deed, a one-third interest in the entire parcels of land in the complaint described; that, if there be any incumbrances on the land, as between the parties such incumbrances be declared a lien on the two-thirds interest belonging to the plaintiff; and for judgment for the sum of \$2,300; and that the same be declared a lien on the undivided two-thirds interest in the parcels of land described in the complaint.

*Bartels & Blood and Mr. Brown, for appellant.*  
*John L. Jerome, for appellee.*

BECK, C. J. The questions presented by the demurrer to the cross-complaint are: (1) Do the averments of the cross-complaint bring the defendant's case within the twelfth section of the statutes of limitations? (2) Do the facts and circumstances set forth in the cross-complaint constitute a cause of action? That is, do they take the case out of the statute of frauds, so as to permit parol proof of the verbal agreement alleged to have been entered into by and between Charles Bohm and his mother, Magdalena Bohm, at the time of the execution of the deed to the said Charles Bohm?

The first ground of demurrer is that the case presented by the cross-complaint is barred by the statute of limitations. The twelfth section of this statute is as follows:

"Bills for relief on the ground of fraud shall be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards." Gen. St. § 2174.

It is alleged in the demurrer that it appears by the cross-complaint that the failure to execute the declaration of trust occurred, if at all, and was known to the defendant, more than three years prior to the filing of the cross-complaint. This proposition implies that the failure to execute the declaration of trust was equivalent to notice from the time of the execution of the deed of a fraudulent intent to deny the existence of the trust. When we consider the close family relationship of the parties,—that of mother and son,—and the implicit confidence which the mother says she reposed in the good faith of her son, we can readily understand why the mere failure of the son to put the verbal contract into writing might not, for a long time, excite the suspicion of the mother that he intended to defraud her out of her property. The defendant alleges positively that she did not discover the fraud upon which she seeks relief until within three years of the filing of her said cross-complaint, and this allegation, in our judg-

ment, stands unimpeached. Had the original transaction taken place between persons not occupying fiduciary relations to each other, the delay in seeking relief would afford strong grounds for holding that the action was barred. See *Pipe v. Smith*, 5 Colo, 146. But such is not the case here presented. The defendant alleges that she was a widow, inexperienced in business matters, and that she always looked to and relied upon her son as one in whom she had a right to and could repose the utmost confidence and trust to aid her in such matters; that the said plaintiff, Mary Bohm, was the wife of her said son; and that the relations existing between herself and the said parties were such as to quiet all suspicions of an intent on the part of either of them to defraud her of her rights in the said premises. If these allegations be true, and for the purpose of testing the sufficiency of the cross-complaint the demurrer admits them to be true, there seems to be nothing unreasonable in the proposition that the defendant might reasonably rest in fancied security for five or six years after making the contract described in the statement of the case before discovering the fraudulent scheme which she charges, to-wit, that her son designed to cheat her out of her property. She alleges that she did not discover such fraudulent intent until within three years of the filing of the amended cross-complaint. Under the peculiar circumstances stated, we are of opinion that the case comes within the provisions of the twelfth section of the statute of limitations, and is therefore not barred.

The next question is whether the averments of the cross-complaint are sufficient to take the case out of the *statute of frauds*, and to permit the verbal agreement set up to be proved by parol evidence. Section 6 of our statute of frauds provides that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed of conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." It is generally conceded that the statutes of frauds of the several states have not essentially changed the rules established by the English statute of 29 Car. II., c. 3, and that the same evidence is necessary to establish a trust under the former as under the latter. 1 Perry, Trusts, §§ 78, 263.

The first apparent difficulty presented by the case at bar is that the alleged trust is not in writing, as required by the statute. The grantee, it is said, promised to put the verbal agreement in writing, and had he complied with the promise the statute would have been satisfied, and the rights of the grantors secured. But he failed and refused, after persuading the grantor to execute to him a conveyance of the fee, to put the terms and conditions of the verbal agreement in writing. If, then, the circumstances set forth in the

cross-bill are not sufficient to take the case out of the operation of the statute, the demurrer was properly sustained. The general rule is that "a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is, in effect, a declaration of trust, and directly within the mischief which the statute of frauds was intended to prevent. It cannot be taken out of the statute by calling the refusal to fulfill it a fraud. Such a refusal is not a fraud, unless the trust exists, and this is the very thing which the statute provides shall not be proved by parol." 2 Lead. Cas. Eq. pt. 1, p. 978; *Johnston v. La Motte*, 6 Rich. Eq. 347; *Brown*, St. Frauds, § 446. Some authorities go a step further, and hold that the mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute, the object of the legislature in requiring a writing to be signed by the party to be charged being to establish a rule which, though operating hardly in some instances, would, in the long run, conduce to certainty, and prevent frauds. 2 Lead. Cas. Eq. 1013. But cases occur which are recognized as exceptions to the general rule, and which are regarded as not coming within the operation of the statute. The elements usually distinguishing such cases from other cases are fraud, accident, and mistake. In the absence of these elements, the grantor in an absolute conveyance is prohibited by the statute of frauds from setting up and proving a parol agreement that the grantee was to hold the land in trust for his benefit.

In order to exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, the authorities hold that it must appear that the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of the steps by which the fraud was accomplished. 2 Lead. Cas. Eq. 1013-1015; *Rasdall's Adm'rs v. Rasdall*, 9 Wis. 384. A verbal promise, not based upon written evidence, to hold land in trust for the benefit of the grantor, is within the letter of the statute, and cannot be enforced. Courts of equity do not enforce mere verbal promises concerning land. It is accordingly held that a verbal promise to hold the title to land for a certain specified purpose, as to convey it to a designated individual, or to reconvey it to the grantor, is not enforceable, unless the transaction by means of which the ownership is obtained is fraudulent, in which equity will regard the person holding the property as charged with a constructive trust, and will compel him to fulfill it by conveying according to his engagement. 2 Pom. Eq. Jur. §§ 1055, 1056. The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from the operation of the statute. *Id.* note 1, and cases cited.

The same rule applies where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute con-

A refusal, under such circumstances, to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance, or administer other proper relief.

In 2 Pom. Eq. Jur. 479, the doctrine is thus stated:

"Wherever two persons stand in such a relation that, while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*"

No illustration of the above rule can be stronger than where an imposition has been practised upon one party by the other, through confidence generated by the close ties of kindred; as that of parent and child. This is a relation in which the most implicit confidence is usually reposed in the good faith of each other, and by reason of this intimate relation and confidence the precautions which would usually be observed in other cases are often omitted, giving opportunities for the practice of imposition which would not be otherwise obtained. When children are of tender years, or inexperienced in matters of business, they may be thus imposed upon by their parents. Again, when the parents become aged, or in dependent circumstances, the situation of the parties becomes reversed, and the like imposition may be practiced, and advantage taken of them by their children.

Applying the principles and rules above announced to the case before us, as the same is stated in the cross-complaint of the defendant, Magdalena Bohm, it would constitute the late Charles Bohm a trustee *ex maleficio* of the tract of land conveyed to him by his mother; for if the facts stated be true, he took advantage of his mother's confidence to obtain the title from her without consideration, by promises to remove the incumbrances, and then to reconvey to her an undivided third of the premises. A title obtained under such circumstances, and by the violation of confidence inspired by a fiduciary relation of the character here alleged, ought not, according to the rules of equity and good conscience, to stand; but the party obtaining such an inequitable advantage, or the party taking and holding under such party, with knowledge or without consideration, should be decreed to hold it in trust, according to the verbal agreement under which it was obtained. Upon this theory, the plaintiff, Mary Bohm, occupied the same position previously occupied by her husband as to the land conveyed to her, if, as alleged, she took such conveyance with knowledge of the circumstances under which the title was obtained from the defend-

ant. The case is one of peculiar hardship, as presented to us. Not only was a conveyance of land obtained by a son from his mother without consideration, upon the strength of fair promises made by him, and upon which the mother relied, but the cross-complaint sets up that this land embraced all the means which the mother possessed. This fact alone, in view of the existing relations, if clearly proven, would render the conveyance on its face unconscionable, and would justify the interference of a court of equity to compel the party obtaining such advantage to do justice. Story, Eq. Jur. § 309a, and note 1; 2 Pom. Eq. Jur. §§ 956-962; *Highberger v. Stiffler*, 21 Md. 338; *Comstock v. Comstock*, 57 Barb. 453.

The verbal agreement, as stated by the mother, appears to have been fair and reasonable; and had the son shown his good faith by reducing it to writing, as he promised to do, the mother may have been afforded a livelihood out of the unincumbered one-third portion of the premises, or out of the money arising from sales of her interest. The refusal, however, of the son, and of the plaintiff, to either put the contract in writing, reconvey to the defendant, or account for the proceeds of sales, would appear to place the defendant in a much worse financial condition than that from which the son proposed to rescue her. We deem this a case in which it becomes the duty of the court to inquire into the facts, investigate the whole transaction, and if it appear that, by imposing upon the confidence so confided in him, the son succeeded in obtaining the title to his mother's property without consideration paid therefor, a decree for proper relief should be entered, if the same can be done consistently with the rules and principles of law and equity.

The foregoing views are based upon the allegations of the cross-complaint, and the law arising thereon. We are aware that it is easier to state a cause of action than to prove the same. In cases of this character, where the cause of action would be barred by the statute of frauds but for the equitable considerations arising out of the circumstances alleged, which permits a resort to parol evidence to establish the real contract, or the means by which the conveyance was obtained, the rule is that the evidence must be strong and unequivocal, and must clearly establish the trust alleged. *Whitsett v. Kershow*, 4 Colo. 423; *Troll v. Carter*, 15 W. Va. 567; *Nelson v. Worral*, 20 Iowa, 469. In the present case, if the defendant's allegations are not sustained, but it should appear that the transaction was just and fair, and that no undue or fraudulent advantage was taken of the defendant, as alleged, the case presented by the cross-complaint must fail. But if the facts alleged in the cross-complaint are sustained by sufficient evidence, then the conveyance made by the defendant must either be set aside, or the plaintiff decreed to hold the property as trustee for the said Magdalena Bohm. In the latter case, also, the requisite relief must be decreed as to the money realized by the plaintiff from sales of portions of said land, if any such were

made, since they pertain to and constitute part of the same transaction.

Judgment reversed, and cause remanded for further proceedings.

(8 Colo. 119)

DENVER & N. O. R. Co. v. LAMBORN and others.

Filed April 6, 1886.

1. RAILROADS—PROCEEDINGS TO TAKE LAND.

Proceedings to condemn for right of way are original, and a deposit as security in a different proceeding cannot be held subject to any contingency in such a matter.

2. SAME—COURTS—JURISDICTION OF SUPREME COURT.

The supreme court of Colorado is not authorized to take original jurisdiction of condemnation proceedings.

Error to district court, Pueblo county. Motion to amend judgment.

*Wells, Smith & Macon*, for plaintiff in error.

*John M. Waldron*, for defendants in error.

PER CURIAM. In this case there were three orders of the court or judge to which objection was taken by plaintiff in error: *First*, the order overruling petitioner's exceptions to the findings and report of the commissioners; *second*, the order denying the so-called supplemental petition; and, *third*, the order commanding petitioner to pay the amount of the damages awarded, or vacate the premises by a given time.

Upon a motion to dismiss upon the ground that there was no final judgment, this court held the first of the foregoing orders to constitute, under our peculiar statute on the subject of eminent domain, such a final adjudication as authorized an appeal or writ of error. This final order of the court below was ultimately affirmed, (8 Pac. Rep. 582,) but the judgment here entered does not, in words, either reverse or affirm the remaining two orders above mentioned.

Counsel now urge that the opinion filed requires a reversal of the second and third orders also, and they insist that the judgment record in this court be amended accordingly.

With reference to the order denying defendant's supplemental petition, we have this to say: The record before us shows that one of the principal grounds relied on by the district judge in making his ruling was the fact that the paper was filed without "leave of court first had and obtained." Upon this question nothing was said in the opinion. We did not consider the authority of the judge to deny the petition because it was filed without leave, or determine the propriety of his action in so doing. Until we had discussed this question of practice, and decided that the judge had no power to deny such an application upon the ground mentioned, we would certainly not be prepared to reverse this order, even were it proper to consider, on error, proceedings subsequent to the final judgment complained of.

But counsel insist most strenuously that, under the opinion, the remaining order should be reversed. We cannot concede to their demand for the following reasons: *First*, the order mentioned, as already stated, commanded petitioner to pay the amount of the award or to vacate the premises; *second*, the opinion does not discuss or pass upon the authority of the court, in view of the statute, to make such an order, though subsequent to final judgment, nor does it contain anything contrary to the spirit of the order. While the right to abandon is upheld, petitioner is by no means permitted to retain possession of the premises without payment of the award. The whole tenor of the opinion is to the effect that when an award is sustained upon exceptions thereto, petitioner must pay the amount thereof, or abandon the premises.

Counsel further urge us to provide by order that the sum deposited at the inception of the proceedings before us, or a part thereof, be used by the petitioner as the statutory deposit or security for possession pending further proceedings for the right of way. They also ask that an additional provision be incorporated into the judgment of this court which shall permit petitioner to retain possession of the right of way pending condemnation proceedings therefor. They insist upon two impossibilities. In the first place, the proceedings to condemn the right of way, whether it be permitted by the district judge as an adjunct to the present action, or whether instituted without any reference thereto, is in its essential character an original proceeding. A new deposit of an amount to be fixed by the court or judge as a condition precedent to the retention of possession is necessary. The \$3,000 lodged with the clerk at the inception of these proceedings must be held until the damages by reason thereof have been determined and liquidated. To say otherwise would be to abandon one of the leading propositions with reference to preliminary occupancy announced in the former opinion,—a proposition concerning the correctness of which we entertain no doubt. The second fatal objection to counsel's demand last above stated is that this court is not authorized by the statute to take original jurisdiction of condemnation proceedings, and therefore any order by us permitting petitioner to retain possession pending an original proceeding hereafter instituted for the right of way would be clearly unwarranted. It is true, as asserted in the oral argument, that in so far as the opinion filed deals with the subject of abandonment it relates to a question that technically arose subsequent to the order designated as a "final judgment." But had we declined to consider this subject, irreparable injury might have resulted to petitioner, and the main question, jealously contested in argument, and urged for adjudication, would have been left undecided. In view of the peculiar attitudes of the parties before us, the diverse ideas concerning their respective rights under the statute, the unsettled condition of the practice, and, especially, the future action of petitioner in the premises, we were persuaded to depart from the

usual custom of this court in other kinds of cases, and determine this question.

The motion is denied.

ELBERT, J., took no part in deciding this motion.

(9 Colo. 122)

CLAIR and others v. PEOPLE.

Filed April 9, 1886.

1. CRIMINAL LAW—TRIAL—REASONABLE DOUBT—CIRCUMSTANCES RELIED ON.

Where the charge to the jury states, among other things, "that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied on to establish the defendant's guilt," the language used is inaccurate, and the metaphor calculated to mislead the jury; for while the court doubtlessly intended to announce the proposition that it was not necessary for the state to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to establish the ultimate facts on which a conviction depended, yet there was great danger of the jury applying the figure to the ultimate and essential facts necessary to conviction. It is no answer that other parts of the same instruction stated correctly the law on the subject of reasonable doubt. The judgment must be reversed.<sup>1</sup>

2. CONSTITUTIONAL LAW—TITLE OF ACT.

Where the title of an act clearly expresses one general subject, the addition of subdivisions thereof does not necessarily vitiate the whole title.

Error to district court, Clear Creek county.

*Tilford & Gilmore* and *R. S. Morrison*, for plaintiffs in error.

*T. H. Thomas*, Atty. Gen., for the People.

HELM, J. Plaintiffs in error, being lessees of a mine, were tried and convicted of removing and concealing ore therefrom with intent to defraud the owner thereof. The prosecution took place under section 2513 of the General Statutes. The evidence upon which the conviction rests is not contained in the abstract before us, but counsel agree that it was "wholly circumstantial." Two assignments of error are pressed for consideration.

One of the instructions given on behalf of the state contained, *inter alia*, the following:

"\* \* \* That the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. \* \* \*

The proposition which the court doubtless intended to announce is that it was not necessary for the state to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to

<sup>1</sup> See note at end of case.

establish the ultimate facts or circumstances on which a conviction depended. This would have been, in our judgment, good law. But while such was the purpose which the court sought to accomplish, it is exceedingly doubtful if the language employed did not mislead the jury. The metaphor used is inaccurate, and liable to misconstruction. It is incorrect to speak of a body of circumstantial evidence as a *chain*, and allude to the different circumstances as the *links* constituting such chain; for a chain cannot be stronger than its weakest link, and if one link fails, the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking. But the word "circumstance" and the word "fact" are frequently used interchangeably. In 1 Bouv. Dict. 569, they are given as synonyms, and instances sometimes arise when it would puzzle a professional philologist to tell which of the two words would more accurately characterize a given "action" or "thing done." In cases where the conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may very appropriately be called "circumstances," and such matters, whether spoken of as circumstances or as facts, must be established by the state beyond a reasonable doubt. 1 Starkie, Ev. 501; *Com. v. Webster*, 5 Cush. 295.

The court in the instructions before us could not have referred to the latter class of circumstances, yet the danger is that the jury so understood him. They may not have distinguished between the minor circumstances and the ultimate circumstances as facts of the case. Since the circumstances mentioned in the charge are spoken of as "links in a chain," and designated as those "relied upon to establish defendant's guilt," it is not at all improbable that the jury regarded them as being—*First*, that defendants were lessees of the mine; *second*, that Ellen Olds was the owner thereof; and, *third*, that the ore was taken with intent to defraud such owner,—each of which propositions must, under the statute, have been established beyond reasonable doubt. It is true, in a sense, that every circumstance, however trivial, offered by the state in evidence, is *relied upon*; but it is true, in a broader sense, that the state *relies upon* the ultimate facts or circumstances, the establishment of which is absolutely essential to conviction. We deem it quite as reasonable to suppose that the

jury misunderstood and misapplied the language used as that they comprehended its appropriate meaning and application. For this reason the judgment must be reversed.

It is no answer that other portions of the charge, and even other parts of the same instruction, stated correctly the law upon the subject of reasonable doubt. Where the charge in a criminal case contains in one part an important correct legal proposition, and in another an incorrect and conflicting proposition upon the same subject, the subject referred to being material to conviction, it cannot be said that the error is avoided; for it is impossible to know upon which proposition the jury depended. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby. *Mackey v. People*, 2 Colo. 13; *People v. Campbell*, 30 Cal. 312; *Caw v. People*, 3 Neb. 369; *Greene v. White*, 37 N. Y. 407, and cases cited.

In view of a new trial, it becomes necessary to consider two other objections urged against the validity of the judgment. This prosecution was brought under an act entitled "An act to facilitate the recovery of ore taken by theft or trespass, to regulate sale and disposition of the same, and for the better protection of mine-owners." Gen. St. 749. It is urged—*First*, that the foregoing title contains more than one subject; and, *second*, that the section under which this conviction took place deals with a subject not clearly expressed therein. Therefore counsel contend that section 21, art. 5, of the constitution, was here violated by the legislature in two particulars. The latter section reads: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. \* \* \*" At first glance, three matters appear to be mentioned in the title above quoted; but, upon examination, it will be seen that the first two are fully comprehended within the third. Had the legislature been content to name the statute "An act for the better protection of mine-owners," in our judgment both of the matters specifically mentioned would have been covered. Provisions regarding the recovery of ore taken by theft or trespass, and also those regulating the sale and disposition thereof, would naturally be embraced within an act thus entitled. There being one general subject expressed, the fact that the legislature saw fit to incumber this title with two specifications under that subject does not render it obnoxious to the constitutional objection now urged. One of the two purposes effectuated by this constitutional provision was to prevent uniting with each other in statutes incongruous matters having no necessary connection or proper relation; and where, as in the case at bar, one general subject be clearly expressed, the addition of subdivisions thereof does not necessarily vitiate the whole title. Of course, an instance might exist where it clearly appeared that although the general subject were given in the title, yet the legislature intended to limit legislation under this subject to certain sub-

divisions thereof specifically mentioned. Such, however, is not true in the case at bar.

Regarding the other objection, above mentioned, we need say but little. The remaining purpose of the constitutional provision before us was to prevent surprise upon the legislature and people, through the pernicious practice of dealing in bills with subjects of which the titles gave no intimation. But this constitutional inhibition must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title it is sufficient. See *Golden Canal Co. v. Bright*, 8 Colo. —; S. C. 6 Pac. Rep. 142; Cooley, Const. Lim. 142-144. Provisions with reference to the removing or concealing of ore by lessees of a mine with intent to defraud the owner, making such act a crime, and defining the punishment thereof, are, we think, fairly comprehended within the title of "An act for the better protection of mine-owners." It is doubtful if a more appropriate method could be devised of guarding the interests of such property holders against this kind of larceny. Such a penal provision is clearly germane to the subject named.

For the error above mentioned in instructing the jury the judgment is reversed.

#### NOTE.

For a full discussion of the question of reasonable doubt, see *Leonard v. Territory*, (Wash. T.) 7 Pac. Rep. 872, and note, 882, and *Minich v. People*, (Colo.) 9 Pac. Rep. 4, and note, 15.

In *Bressler v. People*, (Ill.) 3 N. E. Rep. 521, the court instructed the jury "that the rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty." The charge was sustained on appeal where it was urged that the connecting facts, as well as the circumstances, should be proved beyond a reasonable doubt.

(3 Colo. 127)

#### ALLENSPACH v. WAGNER.

Filed April 9, 1886.

#### 1. LANDLORD AND TENANT—EVICTION BY GRANTEE OF THE REVERSION—ACTION FOR DAMAGES.

Where a tenant holds a lease which is to expire upon the sale of the leased premises, and he brings a suit for damages for being ejected by the grantee in such sale, on the ground that the sale was fraudulent, he cannot recover if the new owner offers to continue him as tenant under the lease, and the eviction was in consequence of non-payment of rent thereunder; and an answer setting up such facts as a defense, and not being traversed, entitles the defendant to a nonsuit.

#### 2. APPEALS—BOND—NOTICE OF APPLICATION—SERVICE ON ATTORNEY.

Where the defendant applies to the county court to fix the time within which the appeal bond should be filed, and the plaintiff's attorney is present, and participates in the discussion, it is not error for the district court to refuse to dismiss the appeal on the ground that no written notice of the application was served upon the plaintiff's attorney.

Error to district court, Arapahoe county.

This suit was originally brought in the county court. The complaint alleges, in substance, that on the twenty-ninth day of March, A. D. 1880, the defendant, Wagner, leased to plaintiff certain premises in the city of Denver for the period of two years, to be used as a dwelling-house and saloon; that on or about the first day of April, A. D. 1880, the plaintiff entered into possession of the premises, and opened a saloon therein; that he spent large sums of money in painting, repairing, furnishing, and fitting up the building for said business, and added valuable improvements thereto, and fixtures, all amounting to the sum of \$1,000; that after the plaintiff had repaired, painted, and added his improvements as aforesaid, and after he had established a thriving and profitable business, at said place, the defendant did willfully and maliciously enter into a conspiracy with one Pettinger to defraud the plaintiff out of his leasehold interest in and to the same; and that, in pursuance of said willful and malicious conspiracy, the defendant caused a deed of said premises, together with other property, to be made to the said Pettinger with intent to defraud the plaintiff, without any consideration whatever therefor; that on or about the fifteenth day of June, A. D. 1880, the said Pettinger and the said defendant, in pursuance of said conspiracy, caused an action to be commenced before WHITTIMORE, a justice of the peace, in the name of Pettinger, to recover possession of the premises on the ground of the said false, fraudulent, and pretended sale; that the case was taken on change of venue to C. L. EYSTER, another justice of the peace, where judgment was rendered against the plaintiff, and in favor of Pettinger, for the possession of said premises; and that afterwards, on the twenty-sixth day of July, A. D. 1880, plaintiff was ousted and ejected from the premises by a constable of said county, under and by virtue of a writ of restitution issued by the said EYSTER on said judgment; that said plaintiff afterwards, on the twenty-third day of December, A. D. 1880, removed said case to the county court by a writ of *certiorari*; and that on the twenty-first day of January, A. D. 1881, the case having been regularly tried in said county court, said court rendered a judgment in favor of the plaintiff against said Pettinger, which said judgment remains in full force and effect; that immediately after plaintiff was so ousted and ejected from said premises the defendant took possession of the premises, with all the valuable improvements thereto, and has remained in possession of the same, and has used and occupied the same, for his own use and benefit, ever since, and still continues to so use and occupy the same, to the exclusion of the plaintiff, and to his damage to the sum of \$2,000. The complaint further alleges that, by reason of said malicious prosecution, in pursuance of said conspiracy to defraud the plaintiff, he has been put to great trouble and expense, and been compelled to pay out large sums of money for costs and attorney's fees, to his damage to the sum of \$1,000. It further alleges that by reason of the ouster and ejectment of the said plaintiff from the said

premises, in pursuance of said conspiracy, the plaintiff's business was entirely destroyed, and his credit greatly impaired, and the plaintiff was put to great trouble and expense in moving his fixtures and furniture, and in procuring other premises for the use of himself and family, to his damage to the sum of \$1,000; that at the time the plaintiff was so ejected and ousted from the premises, and for a long time thereafter, the plaintiff was unable to procure another place in which to carry on his business, and that by reason thereof he lost his time and labor, to his damage to the sum of \$2,000. Wherefore plaintiff prays judgment against said defendant in the sum of \$2,000, his damages, and costs of suit.

The lease attached to the complaint as an exhibit contains a condition of forfeiture for non-payment of rent, and provides that in such case the lessor may elect to declare the term ended, and to re-enter the premises, either with or without process of law. *It also contains a provision that the lease shall terminate at any time if the lessor, Wagener, shall sell the said property.*

The answer admits the lease to the plaintiff and the sale to Pettinger, but denies the conspiracy to defraud; that the sale was a pretended sale, without consideration; and all the other material allegations of the complaint. It then sets up the following defense:

"And defendant avers that said Pettinger, on the purchase of said property by him from defendant, went into possession of all thereof, and collected the rents thereof, and retained the same to his own use, and procured several of said buildings to be insured for his own use, and let portions thereof to various new tenants, and received rents from defendant for the portion thereof occupied by him; and did, after said purchase, offer to, and was ready and willing to, continue said plaintiff as his tenant under said lease during the unexpired term thereof, as though no sale of said premises had been made; but plaintiff refused to continue as said Pettinger's tenant on said terms, but demanded from said Pettinger a new lease, with new conditions, omitting therefrom the provisions of the former lease making the same terminate upon the sale of the leased property by the lessor; and, further, said Pettinger offered to give to plaintiff a new lease, with the terms thereof so changed, but to run for one year, and plaintiff refused said offer also; and also said Pettinger offered to said plaintiff to make him a new lease for said premises on the same terms, and for all the unexpired portion of time, provided for in the former lease, and plaintiff refused said last-mentioned offer; and said Pettinger offered to plaintiff a new lease on said terms, and for the time mentioned in the former lease, conceding to the plaintiff the omission therein of the clause giving a lien for rent on the personal property of the lessee thereunto in said leased building, and plaintiff refused said last-mentioned offer also; and plaintiff at same time refused to pay to said Pettinger the rent then due for the month then elapsed and unpaid, and refused to continue as tenant under said Pettinger, and pay rent according to the terms of the lease given him by defendant; but demanded to stay in said premises, and refused to pay any rent therefor, or accept any of the said offers of the said Pettinger; and thereupon, there being one month's rent then due said Pettinger, (twenty-five dollars,) back rent then unpaid on said premises by the terms of said lease, said Pettinger brought suit against said plaintiff before said O. H. WHITMORE, justice of the peace, for the recovery of the possession of said leased premises, as well because of the termination of plaintiff's tenancy therein

*for non-payment of rent thereon, as provided in said lease, as by reason of the termination of plaintiff's tenancy by the said sale of said premises; and said cause for recovering said possession was tried by said C. L. EYSTER, justice of the peace, on change of venue from said O. H. WHITTIMORE, justice of the peace, and by him judgment was rendered in said suit in favor of said Pettinger, and against said plaintiff herein, which is the same suit mentioned in plaintiff's complaint herein."*

There was no replication to the answer. On the trial in the county court the plaintiff recovered. The defendant appealed to the district court, and on the trial judgment of nonsuit was entered, the court holding that the defendant's answer stated a good and sufficient defense to the action. To reverse this judgment plaintiff brings this writ of error.

*John P. Brockway*, for plaintiff in error.

*Stalcup, Luthe & Shafroth*, for defendant in error.

ELBERT, J. The defendant in error, Wagner, took his appeal from the county court to the district court under section 5, c. 23, Gen. Laws, 254. No written notice was given the plaintiff of defendant's application to the county court to fix the time within which the appeal-bond should be filed. The refusal of the district court to dismiss the appeal on this ground was not error, as it appeared that plaintiff's attorney was present in the county court at the time of the application, and participated in the discussion respecting it. Such being the fact, no written notice was necessary, however it might be otherwise.

We think the district court right in holding the special matter set up in the answer, and unreplicated to, a good defense.

The offer of the defendant's grantee, Pettinger, to waive the provision of the lease terminating the tenancy as subject to plaintiff's lease left the plaintiff without any legal ground of complaint. It then became his legal duty to either pay rent to the grantee of the reversion or to surrender the leased premises. He could not complain that the defendant sold subject to the lease, as his right to sell remained unabridged. He could not complain of having to pay rent to Pettinger instead of Wagner, for a covenant to pay rent is not personal, but runs with the land, and, in this case, the plaintiff's covenant to pay rent was a covenant with the defendant and his assigns. As to the tenant, the grantee of the reversion stands in the same position that the lessor did before he parted with the reversion. Tayl. Landl. & Ten. § 439.

Nor is it sufficient for the plaintiff to say that the sale was fraudulent and void. A court will not inquire into a fraud except at the instance of the party injured by it. The effect of the sale would have been to terminate the plaintiff's leasehold estate under the provision of the lease, had the parties insisted upon it. But the defendant's grantee offered to waive the provision, and treat the sale as subject to the lease. This left the plaintiff without a case calling

for the interference of the courts. Had the grantee insisted upon the forfeiture, and had the powers of a court of equity been invoked by a bill for equitable relief against the alleged fraudulent sale, a decree that the sale should be treated as in all respects subject to his lease would have met all of the plaintiff's equities. What a court of equity would have decreed, conceding the sale to have been fraudulent, was offered the plaintiff without suit, and by him refused. So the answer alleges. Substantially, the answer is this: It denies the fraudulent conspiracy; admits the sale and eviction; but alleges, in effect, that the sale of the leased premises was subject to the lease, and that the plaintiff was evicted by reason of his refusal to pay the stipulated rent to the defendant's grantee. This was a good defense, and, not having been traversed, the defendant was entitled to judgment of nonsuit.

We do not inquire into the proceedings in the action of forcible entry and detainer before the justice and county court. This is not an action to recover possession, but for damages; and we do not see that the judgment in the county court affects the defense. The special matters set up in the defendant's answer were not necessarily in issue in the action in that court, nor do they appear to have been in issue in fact. Wills, Res. Adj. 167.

The judgment of the court below is affirmed.

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(9 Colo. 153)

**MARTIN v. McLAUGHLIN.**

Filed April 17, 1886.

**1. TRIAL—MOTION TO STRIKE OUT ANSWER.**

After a case has gone to trial, a motion to strike defendant's answer from the files comes too late.

**2. PLEADING—APPEAL TO DISTRICT COURT—ANSWER AFTER DEFAULT BELOW.**

A defendant has a right, notwithstanding his default in the county court, to file his answer in the district court upon the appeal. Gen. St. § 500.

**3. CARRIER OF GOODS—SELLING PERISHABLE FREIGHT FOR CHARGES—NOTICE OF SALE.**

Before a common carrier may sell under the statute, perishable freight to satisfy charges thereon, he must give the owner or consignee, or the agent of either of them, at least 24 hours' notice previous to such sale.

Error to district court, Park county.

On rehearing. For former opinion, see 6 Pac. Rep. 137.

This case was originally brought in the county court of Lake county, where judgment by default was rendered against the defendant. The defendant appealed to the district court of Lake county, and filed therein his answer to the complaint. A change of venue was taken to Park county, where a continuance of the case was had on motion of the plaintiff. At a subsequent term, when the case was called for trial, and after the jury had been called, a motion was made by the plaintiff to strike out the answer on the ground that the defendant, being in default for failure to answer in the county court,

could only answer thereafter by leave of court. The court denied the motion on the ground that it came too late, and could not be interposed after the case had gone to trial. This ruling is assigned for error.

The plaintiff in his complaint avers, in substance: *First*, that the defendant was a common carrier of goods for hire, between the town of Grant, the then terminus of the Denver & South Park Railroad, and the town of Leadville. *Second*, that on the twenty-first of December, 1878, the said railroad, at said named terminus, delivered to the defendant a certain lot of goods, which are particularly described, consisting of dressed poultry, fish, and oysters, of the value of \$329.44, the property of the plaintiff, which goods the defendant received, to be by him safely carried to the town of Leadville, and to be delivered to one McCarter, the consignee, for reasonable reward, to be paid by said McCarter, "the said goods having been shipped to him as purchaser thereof." *Third*, that the defendant did not safely carry and deliver the goods; that he carried the same to said town of Leadville, and tendered them to said consignee, who refused to receive or accept the same, or any part thereof; and that thereupon the defendant sold said goods and appropriated the proceeds to his own use, without first having notified the owner and consignor, the plaintiff, that the freight on said goods was unpaid, although he well knew said consignor, and where he lived, and without having given or published the required statutory notice of such sale. *Fourth*, that the defendant so sold and disposed of said goods and appropriated the proceeds as aforesaid without first having given the owner or consignor or the consignee thereof, his or their agent, notice of his intent so to do 24 hours before said sale was to have taken place; and that said consignee did live at the place or town where said goods were sold; and that the defendant did not sell said goods, or any part thereof, at public auction to the highest and best bidder; and did not sell the same, or any part thereof, for the best price that could reasonably have been obtained in the market where they were sold, and at the time they were sold; and that said defendant did not dispose of the proceeds of said sale as provided for in section 1865 of the General Laws of the state of Colorado. Wherefore plaintiff demands judgment, etc.

The defendant in his answer admits that he was a common carrier, and received goods at the time and place averred, but does not know whether the plaintiff was at that time the owner of said goods or not; denies all the other allegations of the complaint; and, further answering, sets up the following as a further defense, to-wit:

"That prior to the delivery of the goods to him as aforesaid he contracted with one Joseph McCarter, the consignee and purchaser of said goods, to receive said goods from said railroad company at a station known as Grant, at the end of said railroad company's track, and to safely carry and deliver said goods to the said Joseph McCarter, at the town of Leadville, in the county of Lake, and state of Colorado, for a certain reward previously agreed upon to be paid by said McCarter; that under and by virtue of said contract he did

receive from the said railroad company, at said Grant station, after first paying all charges thereon, the said goods; that on the twenty-fourth day of December, A. D. 1878, he did safely carry said goods to the town of Leadville, and tendered and offered to deliver them, and each and all of them, to the said consignee, Joseph McCarter; that the said McCarter did absolutely refuse to receive or accept said goods, or any part thereof; that said goods, and each and all of them, did consist of goods which would perish or become greatly damaged by delay in disposing of the same; that the freight on said goods was unpaid; that the consignor of said goods was not known to this defendant; that the defendant thereupon notified the said consignee personally that he would, in twenty-four hours from the time of such notice, sell all of the said goods at private sale for the best price that the same would bring, or that could reasonably be obtained therefor, in the said town of Leadville; that the defendant did, twenty-four hours after such notice, sell and dispose of the same at private sale for the best price that could reasonably have been obtained therefor in the market where they were sold, and at the time they were sold; and that after paying the freight and all charges thereon no surplus was left. Wherefore defendant prays that he may be dismissed," etc.

Replication stricken from the pleadings. Verdict and judgment for defendant.

Section 6 of "An act concerning unclaimed freight" (Gen. Laws, 647) provides for the sale of perishable goods by the carrier, commission merchant, or warehouseman unless the charges on such goods are paid, and they are claimed and taken away: "provided, always, that before any such sale is made, notice shall be given to the owner or consignee, or agent of him, of the intent to sell and dispose of such goods, merchandise, or other property, and the time and place of such sale, either by personal notice, or by letter addressed and properly mailed to him, which said notice shall be given at least twenty-four hours before said sale, if the consignee or owner, or agent of him, so notified shall reside at the place where such goods are; but if the person to be so notified of such sale reside at a distance, then the time of such sale shall be so appointed in such notice as to allow him, in addition to the twenty-four hours above mentioned, a reasonable length of time to claim such goods, or to attend such sale; and if, upon reasonable inquiry, the residence of such consignee, owner, or agent cannot be learned, then, upon the affidavit of such carrier, commission merchant, or warehouseman, or some person in his or their behalf, to be filed and preserved by the carrier, commission merchant, or warehouseman, and by them to be produced and exhibited to any person claiming an interest in the goods sold, or to be sold, as aforesaid, such goods, merchandise, and other property may be sold as aforesaid, without notice."

*D. J. Haynes and Matt. Adams*, for plaintiff in error.

*M. J. Barkey, R. D. Thompson, and John C. Fitnam*, for defendant in error.

**ELBERT, J.** The court properly overruled the plaintiff's motion to strike the defendant's answer from the files. The motion came too late, being interposed after the case had gone to trial. An additional

ground is found in the statute providing for appeals from the county to district courts, which declares that the proceedings in such case in the appellate court shall be *de novo*, and that the defendant, where judgment had been rendered by default, shall have the right to plead any and all defenses which he might have pleaded had the case originally been brought in the district court. Gen. St. § 500. As this statute gave the defendant a right to file his answer in the district court, notwithstanding his previous default in the county court, it was not necessary to ask and obtain leave of the court therefor.

The ruling of the court striking the plaintiff's replication to the defendant's answer from the pleadings is not assigned for error. We notice it only to say that a mistaken view of the effect of the ruling perhaps led to the erroneous result which we find. It will be seen that all of the material allegations of the complaint are put in issue by the denials of the answer. "The further defense," as it is called in the answer, is largely a repetition in another form of matter already in issue. A replication was necessary only in so far as the answer alleged new matter, and this was all that stood admitted when the replication was stricken from the files. Whether the statutory notice was given by the defendant was one of the issues made by the averments of the complaint and the denials of the answer, and no replication was needed to complete it.

We need not inquire into the sufficiency of the evidence to show that the defendant knew that the plaintiff was the owner and consignor of the goods, and that he resided in Denver. The evidence shows clearly that he knew the consignee, and that he resided in and had a place of business in Leadville, the place of delivery. We are unable to find in the bill of exceptions any evidence showing that the defendant, prior to the sale of the plaintiff's goods, gave to either the owner or consignee, or to the agent of either of them, the 24 hours' notice required by the statute in a case of sale of perishable goods for charges, etc. There does not appear to have been any attempt or effort on the part of the defendant, or his agents, to comply with the statute in this respect. On the other hand, it appears from the evidence that the sale took place in *less* than 24 hours after the consignee refused to receive the goods.

The verdict is manifestly against the evidence, and, for this reason, the judgment of the court below must be reversed, and the case remanded.

(9 Colo. 175)

BASSINGER v. SPANGLER.

Filed April 26, 1896.

**1 STATUTE OF FRAUDS—BILL OF SALE—VENDEE—ACTS OF OWNERSHIP.**

The acts of ownership, on the part of the vendee in a bill of sale, sufficient to satisfy the statute of frauds, must be of such a character as to afford reasonable notice to the public of a change of ownership.

**2. SAME—RECORD OF BILL OF SALE—NOTICE.**

The record of a bill of sale, since the law does not require or authorize such instruments to be recorded, is no notice to creditors of the vendor therein.

**3. SAME—BILL OF SALE—APPARENT POSSESSION BY VENDOR OF GOODS SOLD.**

The statute of frauds (Gen. St. 509, § 14) admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor, nor does it admit of a construction whereby there may be a joint or concurrent possession of both vendor and vendee.

**4. SAME—PROOF OF GOOD FAITH—PAYMENT OF VALUE.**

Proof of good faith, and the payment of value, will not supply the place of acts required to be performed by the Colorado statute of frauds.

**Error to district court, Arapahoe county.**

James F. Welborn, prior to December 1, 1881, was the proprietor of the premises No. 323 California street, in the city of Denver, and with his wife occupied the same as his residence. He became indebted to the late E. P. Jacobson, and likewise to various other persons, and previous to December 1, 1881, conveyed these premises to Jacobson, but continued to reside thereon until April 1, 1882. Jacobson became surety for Welborn, March 16, 1880, upon the latter's note of that date, for the sum of \$4,000, payable to J. S. Brown & Bro., of Denver; and, after Jacobson's death, this note, being unpaid, was allowed as a claim against his estate, and ordered by the county court to be paid in due course of administration. The administrators, W. S. Decker and Annie W. Jacobson, paid this claim, amounting to the sum of \$4,430.60.

The present litigation, to a large extent, grew out of an attempt of said administrators to collect from Welborn the last-named claim, and the connection of plaintiff in error, Bassinger, therewith, arose as follows: Bassinger, being the father of Mrs. Welborn, both he and wife became guests of the Welborn family about November 1, 1881, and thereafter continued to reside with the Welborns upon the premises aforesaid, until April 1, 1882. During this time another debt of Welborn's, which he had secured by a chattel mortgage upon his household goods and furniture, matured, and the goods were advertised to be sold on December 8, 1881, upon said mortgage. The day of the sale arrived, and quite a number of persons came to the house to attend the sale, but owing to the purchase of the property by Dr. Bassinger from Welborn prior to the hour advertised for such sale, and the payment of the chattel mortgage by Bassinger, the sale did not take place. The amount paid by the latter for the goods appears to have been the sum of \$6,000. The goods purchased consisted of carpets, furniture, and other household effects. A bill of sale was executed by Welborn to Bassinger, and it was announced to the persons present that the property would not be exposed to sale upon the mortgage, for the reasons that it had been purchased by Dr. Bassinger, and that the indebtedness had been paid by him. A formal or constructive delivery was made of the goods by Welborn to Bassinger, in the presence of several persons, and Bassinger afterwards, on the same day, caused the bill of sale to be recorded in the office of the

clerk and recorder of Arapahoe county. After Bassinger's purchase he and his wife continued to reside with the Welborn family as before, there being no visible change of the family relations, nor of the possession of the property purchased. Welborn's door-plate still remained on the door, but Bassinger did not indicate, by any outward sign, that the said house was his place of abode. He, however, testified upon the trial below, in which he was supported by the testimony of Welborn, that he had the absolute possession and control of the goods purchased by him, from and after the time of the transfer thereof to him as aforesaid. Subsequent to the purchase of the goods by Bassinger, Decker spoke to him about payment of rent for the premises, but he declined to pay rent, referring Decker to Welborn. Decker also advised with him at different times about the sale of the household furniture, stating, in substance, that he was desirous of disposing of the premises upon which Welborn and Bassinger were residing, and that it would be for the interests of both parties to sell the premises and the furniture and goods to the same purchaser, he having one in view, and asking Bassinger to put a price upon the goods. It appears that afterwards Bassinger was negotiating with one Sands with respect to the sale of the goods, and that Sands was at the same time negotiating with Decker for the purchase of the real estate; but before these negotiations were consummated the administrators of the Jacobson estate attached the goods and household furniture as the property of Welborn, in satisfaction of the judgment entered in the county court against the Jacobson estate. Bassinger replevied the goods as belonging to him, and upon the trial of the replevin suit, at the conclusion of the testimony, the court instructed the jury to return a verdict for the defendant, which was done, and judgment entered thereon; to reverse which judgment this writ of error is prosecuted.

*Chas. H. Toll*, for plaintiff in error.

*Decker & Yonley*, for defendant in error.

BECK, C. J. The question presented by this record for our decision is whether the transaction between James F. Welborn and Dr. Bassinger comes within the fourteenth section of the statute of frauds, and constitutes thereby a *fraud in law*. This section reads as follows:

"Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." Gen. St. § 1523.

In this case, as in many of like character, the good faith of the purchaser is not questioned, but the attaching creditors, who are represented by the defendant in error, rely upon the requirements of the

statute that the sale must be followed by an *actual* and *continued change of possession*, and the failure of the purchaser to comply therewith.

The principal error assigned is the withdrawal from the jury of the questions of fact whether or not the evidence showed a sufficient delivery of the property sold, and whether the same was followed by an actual and continued change of possession. Had there been conflicting testimony on these points, and if the testimony on the part of the plaintiff had been sufficient in law to have sustained an affirmative verdict, the action of the court would have constituted error. But the evidence upon these points was almost, if not quite, that given by the witnesses of the plaintiff, Bassinger, and was not conflicting. It is only necessary for us, therefore, to consider its legal effect. The statute is plain, positive, and peremptory. It admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee; nor can a case be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide*, and no fraud intended. Unless the purchaser can show such a substantial compliance with its terms as affords visible notice to the community of a change in the ownership of the goods, the transaction constitutes a fraud in law, and as such must be held to be void as to creditors and subsequent purchasers in good faith of the vendor.

*Cook v. Mann*, 6 Colo. 21, is cited by both parties in the controversy as a proper construction of this statute, both finding therein principles of law announced which they construe as supporting their respective theories as to the proper disposition of the points involved in the present controversy. They also find, as they suppose, analogous facts and circumstances, in respect to which they insist that the same rules of construction must be applied. The circumstances of that case respecting the change of possession, when carefully examined, will be found to differ widely from those appearing in the case at bar. That was the sale of a stock of goods, consisting of boots and shoes. The stock was in the store-room in which Haywood, the owner, was and had been pursuing his business as a merchant. The goods sold were not removed from this store-room at the time of the sale. Haywood did not quit the store-room upon the completion of the sale, but the provisions of the statute were satisfied nevertheless. An inventory of the goods was taken, and the price (\$4,000) was paid. The purchaser, Mann, took immediate possession, not only of the goods, but of the store-room in which they were situated. He assumed the lease, hired his clerks, (one of them being Haywood, the former proprietor,) and changed the sign by placing his own sign, "C. Y. Mann & Co.," over the door. He then devoted his time and attention to the business, personally managing the same, at the same stand, replenishing the stock when necessary, and assum-

ing exclusive control of the business. Chief Justice ELBERT, who delivered the opinion, says: "All the *indicia* of ownership usual in mercantile business were present, and there was a complete change of the control and dominion of the property." Now, it is obvious, from this statement of the case referred to, that so far as the immediate delivery of possession was concerned, and likewise with respect to the actual and continued change of possession, there was nothing colorable or uncertain. The possession was neither joint nor concurrent in the vendor and vendee, but visibly absolute in the vendee. No one could approach the store without witnessing the evidence of a change of ownership. The employment of the former proprietor in the capacity of a clerk was held to be unobjectionable, since a clerk is not vested with the possession of the merchant's goods. If the transaction was tainted with fraud at all, it was fraud in fact, and not fraud in law. But no fraud in fact was charged. The rules of law laid down as a proper construction of the statute were:

"The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal; such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible."

The rules here announced are believed to be the established rules of construction of the statute quoted, and apply to all cases, so far as the facts necessary to be done *subsequent* to the purchase are concerned. These acts must be of such a character as to afford reasonable notice to the public of the change of ownership. The same acts are not required in each case that arises, but equivalent acts must be performed in order to render the sale valid. In the case cited no essential precaution seems to have been omitted.

Now, what acts did Dr. Bassinger perform, subsequent to his purchase, which afforded notice to the community that he, and not Welborn, owned these household goods. At the time of the sale Welborn was the party in possession of the house, and Dr. Bassinger and his wife were the guests of Welborn and his wife. Both families continued to reside in the house after as before the sale. How, then, did the plaintiff acquire the *actual, exclusive, and visible* possession which is essential to the validity of the transaction? We have just seen how the same statute was satisfied in the purchase of a stock of goods, but we look in vain for equivalent acts performed by Dr. Bassinger in the present case. He made or kept up the fires in the furnace; he did this before as well as after the sale. He paid some of the household expenses; but to whom is not stated. He talked of his purchase with some of his neighbors; this is of no force,—the statute does not permit the transaction to rest on the declarations of the parties, nor upon acts of such character as to be insufficient to give the req-

notice to creditors. He recorded the bill of sale given him by Welborn; the law does not require or authorize such instruments to be recorded,—hence the record is no notice to creditors. Both he and Welborn say he assumed possession and control of the furniture from the time of the purchase until the levy of the attachment; but when asked what was done to manifest this to the outside world, only the above-mentioned matters, and the publicity of the sale on December 8th, could be stated. It is not sufficient that a sale is open and *bona fide*. These facts need not be disputed by a creditor. It is easier to state what Mr. Bassinger failed to do. He did not visibly or openly assume the proprietorship of the residence in which the carpets, chairs, and other goods were situated. He did not accept a lease of the house, but refused to pay the rent. He did not indicate, even by a sign upon the door, that the house No. 323 California street was the place of his residence. On the contrary, a caller would be informed by the door-plate that it was the residence of James F. Welborn. Inside, no change of the relations of the two families,—Dr. Bassinger and wife, and Mr. Welborn and wife,—or in the occupation of the house, or use of the furniture, was apparent.

Counsel for plaintiff in error relies, mainly, upon the good faith of the transaction, and cites us to respectable and able decisions in favor of his theory of this case; but the fact that these decisions were based upon statutes dissimilar to ours—statutes not containing the peremptory requirements of section 14 of our statute of frauds—renders them inapplicable as authority in this case. His principal reliance is upon the decisions of the supreme court of the state of Pennsylvania. The statute of Pennsylvania, upon which the decisions cited were based, does not appear to have contained the provisions of section 14,—that “unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive.” By reason of the absence of such statutory provisions, the courts of Pennsylvania are able to recognize, in certain cases, a constructive delivery of personal chattels, followed by a constructive or concurrent possession, and to make the validity of a sale depend upon the *bona fides* of the transaction. This distinction between the statutory rules of the two states is a very important one. The validity of the same transaction, if tested under one statute, may be decided upon the weight of testimony as to whether or not there existed therein *fraud in fact*. We do not mean to say that all cases arising under the statute might be so determined; but the other statute requires the submission of the further issue, in all cases, whether certain acts have been performed the omission of which constitutes *fraud in law*, and conclusively avoids the sale. We can, therefore, only recognize as

authority in the construction of the foregoing section of our statute decisions based upon the same or similar statutory provisions. As said by Chief Justice CURREY in *Woods v. Bugbey*, 29 Cal. 479:

"It is quite useless to cite decisions made under the statutes of Elizabeth, and of New York or other states, allowing the want of an immediate delivery, and an actual and continued change of possession, to be explained or accounted for, as authoritative expositions of the rule which our statute has provided "

The decisions cited in the briefs, upon statutes substantially the same as our own, are those of California, Nevada, Montana, Vermont, and Connecticut. The statute of Missouri is *similar*, as is also the rule of decision established by the courts of that state. The statutory provisions of the following states appear to be essentially different from section 14 of our statute of frauds: Pennsylvania, New York, Michigan, Maine, Massachusetts, and New Hampshire.

This classification of authorities discloses that the cases tending to sustain the plaintiff's theory arose upon statutes unlike the statute under consideration. For example, in *Evans v. Scott*, 89 Pa. St. 136, the same house was occupied jointly by two brothers, one being married and the other a bachelor. The lease of the building was in the name of the married one, but both contributed to the payment of the rent. The carpets upon the floor had been purchased and laid down by the married brother; but, being unable to pay for them when the note given therefor matured, he sold them to his brother, who paid the note, and by order of the vendor received from the merchant a bill of sale of the carpets; after which they were suffered to remain in the same situation as they were previous to the sale, and to be used by both brothers as before. Held, there was a sufficient change of possession; that an actual change of possession could not be made without one brother turning the other out of doors, which was unnecessary. The court held that "the question, under such circumstances, to be submitted to the jury, is whether the change of possession was actual and *bona fide*,—not pretended, deceptive, and collusive; and whether such change of possession was all that could have been expected of the vendor, [vendee,] taking into view the character and situation of the property, and the relations of the parties." This would indicate a flexible statute, which may be construed to suit the circumstances of the parties.

The rule laid down in *Hall v. Parsons*, 17 Vt. 271, was that a concurrent possession of personal property by the vendor and vendee, after the sale, renders the sale fraudulent *per se* as to the creditors of the vendor; but to have that effect the joint possession must appear to be of the same description, in the use, occupancy, and disposition of the property, as that of joint owners.

In *Norton v. Doolittle*, 32 Conn. 405, the court say:

"The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. It applies both to property attached

and to property sold. The policy which dictates, and the prevention at which it aims, requires its rigid application to every case where there has not been an actual, visible, and continued change of possession."

The supreme court of California construed a section of the statute of frauds of that state, corresponding to our section 14, in *Stevens v. Irwin*, 15 Cal. 503, the decision being subsequently approved as the true rule of construction in *Godchaux v. Mulford*, 26 Cal. 316. The rule laid down in those cases was:

"Delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous,—not taken to be surrendered back again; not formal, but substantial."

In *Brown v. Kimmel*, 67 Mo. 430, the sale of a stock of goods in a store was held void because no *indicia* of a change of ownership were visible. The sign of the former proprietor, who made the sale, was permitted to remain on the building, and the vendor was frequently at the store after the sale, and occasionally made sales of goods himself. The court held that the retention of the old sign amounted to a declaration to the public that Dogherty was still proprietor of the store, and that it gave to the transaction an equivocal character. It was further held that the change of possession, not having been such as the statute required, as appeared from the undisputed facts of the case, should have been declared to be fraudulent as a matter of law. See, also, *Woods v. Bugbey*, 29 Cal. 466; *Lawrence v. Burnham*, 4 Nev. 361; *Hull v. Sigsworth*, 48 Conn. 258; *Clafin v. Rosenberg*, 42 Mo. 449; *Perrin v. Reed*, 35 Vt. 2; *Pierce v. Chipman*, 8 Vt. 337.

The point is made, and strongly insisted upon, by counsel for the plaintiff in error, that a compliance with the terms of the spirit and letter of the statute, in the present case, was waived by the knowledge and conduct of the creditors. They knew of the sale to the plaintiff, and practically conceded that his purchase was made in good faith. These circumstances in no manner relieved the plaintiff from a compliance with the terms of the statute. The statute being peremptory, the purchaser's failure to comply therewith placed the creditors of his vendor in the condition mentioned in the case of *Perrin v. Reed*, *supra*, where it was held that "a creditor, with full knowledge of such a transaction, has notice of a sale that in law is void as to him;" or, as held in *Lawrence v. Burnham*, *supra*: "Whether the creditor has knowledge of such a sale or not is of no consequence."

It is argued that adherence to the strict letter of the statute works a manifest hardship in the present case; that the statute should have a reasonable interpretation, according to the nature of the property conveyed and the circumstances of the parties. Authorities to such effect are cited. That the rule operates with hardship in many cases

affords to the courts no excuse for declining to enforce it. Cases decided under statutes containing the provisions of our section 14 are often preceded by the statement that the "good faith" of the transaction is not questioned; but, notwithstanding such concession, the transaction is never sustained, when resting on this proposition alone. In so far as the specific requirements of the statute are concerned, as elsewhere stated, they admit of no excuse. All courts administering this statute, so far as we are advised, hold that proof of good faith and the payment of value will not supply the place of the acts required to be performed. The cases of *Hull v. Sigsworth*, *Woods v. Bugbey*, and *Lawrence v. Burnham*, *supra*, were all cases of hardship, and others of this character might be cited.

Our statute has not always been in its present peremptory form. Section 14, however, is literally identical with section 14 of the original act of October 31, 1861, (Laws 1861, p. 244,) down to the closing words of the present section,—"*and this presumption shall be conclusive.*" This clause in the original act was in the following form: "And shall be conclusive evidence of fraud." But the legal effect of the original section was so qualified by an additional provision as to practically alter the remedy and change the legal effect of the section. This provision was: "*Unless it shall be made to appear on the part of the person claiming under said sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers.*" If the latter provision still existed, the plaintiff's arguments, authorities, and evidence would be in point; for it is plain that in such case the validity of plaintiff's purchase might have been determined in his favor upon proof that the same was made in good faith, and without any intent to defraud creditors or purchasers. The elimination of this qualifying provision is a strong indication that it rendered the original section inefficient to prevent fraudulent transfers of personal property. Its effect, while in force, was to authorize a recovery by the vendee in every case upon the finding of a jury that his purchase was made in good faith, and without any intent to defraud creditors or subsequent purchasers. The experience of the bar, as well as the experience of the courts, is that proof of this character can be as readily produced in cases of fraudulent sales and purchases as in those in which no element of fraud exists. But by striking out this provision, and resting the issue, in every case, upon the question of *fraud in law*, instead of *fraud in fact*, though attended with hardships in some cases, the statute was rendered effective. No pretext or excuse for non-compliance with the spirit of its provisions could then be entertained, for thereupon they became positive and peremptory, and failure to comply therewith raised a *conclusive* presumption that the sale was fraudulent and void as to creditors, and to subsequent purchasers in good faith. The fifth section of the New York act of December, 1827, concerning fraudulent conveyances, etc., was almost identical with section 14 of our statute of 1861. It appears

to have been passed to establish a stable rule for the prevention of frauds upon creditors, instead of the statutes of 13 & 27 Eliz., which had become so incumbered with exceptions by the decisions of English and American courts as to be practically of no force.

An interesting and concise statement of the effect of the above-mentioned statutes, and the adjudications thereon, is given by chief Justice CURREY in *Woods v. Bugbey*, *supra*. Respecting the fifth section of the New York act of December, 1827, he says: "It failed to prevent the frauds against which the statutes of 13 & 27 Eliz. were aimed, as the judicial history of that state since the act went into effect abundantly attests." We are of opinion that "the judicial history" of both this country and England demonstrates the wisdom of a positive rule, such as that in force in this state, and the other states previously referred to, under which no latitude is given the courts to change the issue from fraud in law to fraud in fact. As held in *Norton v. Doolittle*, *supra*, the rule is one of *policy*, and to make it effective as a remedy it must be rigidly applied in every case where there has not been an *actual, visible, and continued change of possession*.

The argument that a reasonable interpretation must be placed upon the statute, and that impossibilities should not be required, is recognized by us as sound. At the same time a purchaser cannot be permitted, in any case, to fold his arms after making his purchase, take no steps to complete the sale, and have his case excepted from the rule by reason of his good faith, and the inconvenience attending a substantial compliance with the statute. It is true, as suggested by counsel for plaintiff in error, that the statute does not require impossibilities. A purchaser of 2,000 sacks of grain cannot reasonably remove them all immediately. The purchaser of a kiln of hot brick cannot remove the brick while hot. But other acts can be substituted which will apprise the community of the change of ownership, and satisfy the demands of the law. This subject was considered in *Lay v. Neville*, 25 Cal. 545, wherein the court say:

"It was not intended by the fifteenth section of the statute of frauds to make a sale void, as against the creditors and purchasers of the vendor, unless the vendee should perform in every case what might in some cases be an impossibility. \* \* \* The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case."

The court makes a distinction between ponderous articles, as a block of granite or a stack of hay, and articles of small bulk, as a parcel of bullion or a sack of grain. After consideration of the various circumstances, the rule stated by the court as applicable to all cases is:

"It was intended that the vendee should immediately take, and continuously hold, the possession of the goods purchased in the manner, and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent *bona fide* purchaser would do in the exercise of his

rights over the property, so that all persons might have notice that he owned and had possession of the property."

Upon a full consideration of the law applicable to the present case, and of the facts as shown by the plaintiff's witnesses, we are of opinion that no error was committed in withdrawing the case from the consideration of the jury. The rule is that where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper to direct a verdict for the defendant. *Stern v. Henley*, 68 Mo. 262; *Brown v. Kimmel*, *supra*. The case of *Parks v. Barney*, 55 Cal. 240, is not in point, since the evidence there strongly tended to show a compliance with the provisions of the statute.

In respect to the attempted negotiations of Mr. Decker, we fail to see how they excuse the non-performance of acts required to be done by the plaintiff.

The judgment must be affirmed.

## SUPREME COURT OF KANSAS.

(35 Kan. 286)

ATCHISON, T. &amp; S. F. R. Co. v. IRWIN.

Filed May 6, 1886.

## TRIAL—INSTRUCTIONS—QUESTION NOT MADE BY PLEADINGS.

In an action against a railroad company to recover for personal injuries, where the plaintiff specifically alleged that the injury was caused by the negligence of his co-employee, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the plaintiff might recover if the injury was caused by the negligence of the fireman.

Error from McPherson county.

*A. A. Hurd and Frank Doster*, for plaintiff in error.

*Frank G. White*, for defendant in error.

JOHNSTON, J. This action was brought by William H. Irwin against the Atchison, Topeka & Santa Fe Railroad Company, to recover for personal injuries sustained by him while serving the company as brakeman. It was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff, and the defendant brings the case here upon alleged errors in the instructions given to the jury. The plaintiff, after stating his employment as brakeman, and that while so engaged, on April 14, 1883, it became necessary for him to couple together the engine and a certain car, set forth the cause of the injury, and the liability of the defendant therefor, in the following language:

"That the engineer of said train, who was then an employe of the defendant, and a co-employe of the plaintiff, and controlling and operating his said engine at the time, backed his said engine towards the plaintiff and the said car, for the purpose of permitting the plaintiff to couple together the engine and said car; that when the engine had approached to the proper distance from the said car the plaintiff signaled the engineer to stop the engine, and stepped in the proper manner, and at the proper time, between the engine and the car for the purpose of making the coupling as aforesaid; but plaintiff avers that the said engineer, neglecting the legal duty which he owed himself, this plaintiff, and defendant, negligently and unlawfully failed, neglected, and refused to stop his said engine when so signaled as aforesaid by plaintiff, or to pay any attention to the plaintiff's said signal, by reason whereof, through the gross negligence and default of the said engineer, and without any negligence or fault of the plaintiff, the said engine was propelled against the said car with such terrific force and a terrible jar as to nearly throw the plaintiff from his feet, and to catch the thumb and finger of his left hand between the bumpers of the said engine and car," etc.

The petition contains no averment that the injury occurred by reason of any other cause, or through the negligence or fault of any co-employe of the plaintiff, other than the engineer. The defendant denied the allegations of the plaintiff, and alleged that the injury resulted from the plaintiff's own carelessness.

The jury were instructed, among other things, that—

"The plaintiff here seeks to recover against the defendant for a claimed injury which he says he received while in the employment of the defendant company in the operation of its railroad, and he says that he is entitled to recover by reason of the negligence of certain other employes of the company, to-wit, the engineer or fireman, or both. Now, I say to you that, under the laws of this state, if this injury occurred while these parties were in the performance of their duty in operating cars on the line of this defendant's railroad, then the acts of this engineer and fireman were the acts of this defendant, and they are liable for the acts of the engineer and fireman."

In another part of the charge it is stated:

"Now, the question is, what may be the improper acts of these men in the law, so that this defendant company will be liable for it? The rule of law incumbent upon them was—both the engineer and fireman—that, in the performance of their duties in operating the engine at the time the accident occurred, was the use of ordinary care and attention," etc.

And in still other portions of the charge the jury were told that the defendant would be liable for the negligence of the fireman as well as for that of the engineer. The exceptions taken to these instructions are well founded. It is well established that the plaintiff is not entitled to recover upon any other basis or cause of action than that alleged in his petition. The only issue tendered by him was the alleged negligence of the engineer. The petition contained no general charge that the injury resulted from the negligence of the defendant, and no intimation that it was occasioned by any fault or neglect of the fireman. The court, therefore, by its charge, undertook to enlarge the issue, and to present to the jury a case not made by the pleadings. This was error. *Union Pac. Ry. Co. v. Young*, 8 Kan. 658; *Price v. Railway Co.*, 72 Mo. 414; *Edens v. Railroad Co.*, Id. 212; *Waldhier v. Railroad Co.*, 71 Mo. 514; *Ely v. St. Louis, etc., Ry. Co.*, 16 Amer. & Eng. R. Cas. 342.

Undoubtedly, the company is liable for the negligence of the fireman as well as for that of the engineer; but the plaintiff cannot plead that the liability arose from the negligence of the engineer, and sustain his action by showing negligence in the fireman, or in some other servant of the company. If the proof disclosed that the injury was occasioned by the negligence of the fireman, or through some joint fault of the engineer and the fireman, the plaintiff might, under the liberal provisions of the Code, have obtained leave to amend his petition. But in that case the defendant would have been entitled to a continuance, as it could not be compelled to enter at once upon the trial of a wholly different issue than that which had been formed by the pleadings. The defendant had a right to assume that it would not be called upon to meet any issue of negligence in the fireman, and may have gone there entirely unprepared to try that question. But the plaintiff made no application to amend, and no amendment was made. If the evidence indisputably showed that the injury was caused by the negligence of the engineer, and not through any fault of the fireman, we might hold the instruction to be harmless; but

such is not the case. The evidence is conflicting with regard to the fault of the engineer, and there was incidentally brought into testimony some proof tending to show negligence in the fireman. In view of this condition of the evidence, we are unable to say that the directions given by the court that the defendant might be held liable for the negligence of the fireman did not mislead the jury, and we must, therefore, reverse the judgment, and remand the cause for a new trial.

(All the justices concurring.)

(35 Kan. 282)

PIATT and another v. HEAD.

Filed May 7, 1886.

TRIAL—ARGUMENT—WAIVER.

Where a case is tried before the court without a jury, and at the close of the evidence the plaintiff's counsel, in the hearing of the court, ask the defendants' counsel whether they desire to argue the case or not, stating that the plaintiff's counsel do not wish to do so; and the defendants' counsel, hearing the same, do not answer; and the court then renders its decision, which is adverse to the defendants; and the defendants' counsel except to the decision, and then ask the court to permit them to argue the case, and the court refuses; *held*, not error; that defendants' counsel, by their silence, waived their right to make an argument at that time, or at any time prior to their argument on their motion for a new trial.

Error from Washington county.

*A. S. Wilson and A. M. Hollowell*, for plaintiffs in error.

*Love & Smith*, for defendant in error.

VALENTINE, J. This was an action brought by F. A. Head against Kentuck B. Piatt, F. M. Laving, and H. J. Bond, on two promissory notes executed by Piatt to Laving, and indorsed to Head, and a mortgage on real estate executed by Piatt to Laving to secure these two notes, and to secure another claim. Laving owned, and had become entitled to recover, on this other claim, and set up the same in his answer, and also asked for the foreclosure of the mortgage. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff on both of his notes and the mortgage, and also in favor of Laving on his claim and the mortgage; and Piatt and Bond, as plaintiffs in error, bring the case to this court, making Head alone the defendant in error. Laving has not been made a party to the case in this court. Bond, in the court below, made default, not having either answered or appeared in the case, although duly summoned, and the pleadings of the plaintiff, Head, unquestionably authorized the judgment that was rendered in his favor. Hence, Bond can certainly have no grounds for a reversal of the judgment of the court below. As to Piatt, he consented that judgment should be rendered against him upon one of the promissory notes sued on by Head, and also upon the claim set up by the defendant Laving, and that the mortgage should be fore-

closed with respect to both these claims. Hence, Piatt has no ground for alleging error, except with respect to the other promissory note sued on by Head, and the mortgage so far as it secures such note. This other promissory note last mentioned was executed December 26, 1882, by Piatt to Lavinger, for \$400, and was indorsed by Lavinger to Head, and became due on February 1, 1883. The defendant alleged a failure of consideration with respect to this note; that it was indorsed to Head after it became due; and that Head had knowledge of such failure of consideration; and these were the only disputed questions of fact submitted to the court below for decision. We shall assume, for the purposes of this case, that there was a failure of consideration for the note. There was also some evidence introduced by the defendant Piatt tending to show that the note was transferred to Head after maturity, and that he had notice of the failure of consideration. But, on the other side, there was ample evidence introduced to show that the note was indorsed to the plaintiff before maturity, and that he did not have any notice of any failure of the consideration therefor. The court found, generally, in favor of the plaintiff, and rendered judgment accordingly, without any argument having been made on the evidence by counsel on either side. This judgment was rendered on December 2, 1884. On December 3, 1884, the defendants Piatt and Bond filed a motion for a new trial, and also filed an affidavit in support of their motion. The grounds set forth in their motion for the new trial are as follows:

"(1) Irregularity in the proceedings of the court during the trial. (2) Abuse of discretion on the part of the court in refusing to allow said cause to be argued by counsel. (3) Accidents and surprise which ordinary prudence could not have guarded against. (4) That the decision is not sustained by sufficient evidence. (5) That the decision is contrary to law. (6) Errors of law occurring at the trial, and excepted to by the defendants at the time. (7) Newly-discovered evidence material for the said defendants, which they could not have discovered and produced at the trial by the use of ordinary diligence."

The principal grounds urged for the new trial were the second, fourth, and fifth, as above set forth. The defendants, in support of said second ground, filed an affidavit of A. M. Hallowell, the attorney for the defendants Piatt and Bond, which affidavit tended to support such ground. On the other side the plaintiff filed a counter-affidavit of J. G. Lowe, which states, among other things, the following:

"That after the evidence had been all introduced in the cause, Charles Smith, partner of affiant, and one of the attorneys for plaintiff, asked of A. M. Hallowell, in a loud voice, and in the presence and hearing of the court, two or three times, if he wished to argue the case, and stated that counsel for the plaintiff did not wish to argue the cause unless counsel for defendants should wish to do so; that counsel for defendants remained quiet, and did not answer counsel for plaintiff, nor demand a right to argue; that the court then rendered judgment for plaintiff, and asked defendants' counsel if he wished to except to the ruling; that counsel for defendants then took an exception, and then told the court that he would like to argue the cause; that the court then in-

formed counsel that he was satisfied, and did not care then to hear any argument; that every legal point in the case had been as fully argued by counsel for both parties as they desired, without limit or restraint."

This motion for a new trial was fully argued upon both sides, and was overruled by the court, to which ruling the defendants excepted. The only question presented to this court is whether the court below abused its discretion in refusing to hear an argument in the case after the evidence had all been introduced, and before a motion for a new trial was filed. After the motion for a new trial was filed, and upon such motion, a full argument was had in the court below; but the real question presented to this court is whether the court below erred in refusing to hear such argument prior to the filing of the motion for the new trial. Of course, the court below knew what had transpired in the case, and taking the affidavit of J. G. Lowe to be true, which it evidently did, and which we think we must also do, we cannot, under the circumstances, say that the court below committed any material error. We think the defendants waived all their right to argue the case upon the evidence before the decision. It seems that the case had already been sufficiently argued upon all the legal questions involved in the case. When the plaintiff's counsel asked the defendants' counsel whether they desired to argue the case or not, stating that the plaintiff's counsel did not wish to do so, and the defendants' counsel failed and refused to make any answer, the court had a right to infer that the defendants' counsel did not wish to argue the case, and had a right to render its decision, as it did, without first hearing any argument upon the evidence. There is no claim or pretense that the defendants' counsel did not hear the plaintiff's counsel, and unquestionably they did. The affidavit above quoted shows that counsel for the defendants did not ask to argue the case until after the decision of the court below had been made, and until after they had taken an exception to such decision. Besides, in the present case, the entire case was submitted to the court for decision. The court was the trier of the facts of the case as well as of the law, and the defendants, on the motion for the new trial, had a right to make, and did make, an argument to such trier upon the entire case, the facts, the evidence, and the law. Under such circumstances, we think a clearer case of error, and a stronger case for reversal, should be made out than where the case has been tried before a jury. In the case of *Douglass v. Hill*, 29 Kan. 527, the case was tried before a jury, and a strong case of error was made out. In that case there was really no excuse for refusing to permit an argument to be made to the jury, and, of course, the judgment rendered therein had to be reversed. In this case, however, we think there was not only a sufficient excuse, but a justification, for the action of the court in rendering its decision without arguments having first been made; and we think there was a sufficient excuse for the refusal of the court to hear arguments after the decision was made, and prior to the time of the

hearing of the motion for the new trial. Bond was in default, and had no right to make any argument at all; and Piatt's counsel, by his action, or rather silence, when he should have spoken, waived his right to make an argument at the close of the trial.

Before closing this opinion we might suggest the question that if there was really a failure of consideration for the \$400 note sued on by Head, why did the defendant Piatt voluntarily permit a judgment to be rendered against him, and in favor of Lavering, the original payee of said \$400 note, for money due on still another claim still held by Lavering, and for the foreclosure of this same mortgage, which secured all the claims? He knew that the said \$400 note was a negotiable instrument, and that Head claimed to be an innocent holder thereof for value, and by indorsement before maturity, and he should have been prepared to defeat all claims of Lavering up to the amount of this note.

The judgment of the court below will be affirmed.

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(35 Kan. 290)

INGRAHAM v. MORRIS.

Filed May 7, 1886.

1. ASSUMPSIT—WORK AND LABOR—PLEADING.

An allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted with the defendant to cut and bind *all* the wheat which the defendant owned.

2. ERROR—VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting upon a given subject, but sufficient to sustain the verdict of the jury, the supreme court cannot set aside such verdict.

Error from Wyandotte county.

*W. C. Stewart*, for plaintiff in error.

*Stevens & Stevens*, for defendant in error.

VALENTINE, J. This was an action brought by George A. Morris before a justice of the peace of Wyandotte county, Kansas, against H. S. Ingraham, for work and labor in cutting and binding wheat. Judgment was rendered in favor of the plaintiff, and against the defendant, and the defendant appealed to the district court, where the case was tried before the court and a jury, and a verdict and judgment were rendered in favor of the plaintiff, and against the defendant, for \$54.50, and the defendant, as plaintiff in error, brings the case to this court.

The plaintiff in error, defendant below, alleges two principal grounds for reversal of the judgment of the court below: *First*, that the plaintiff below did not prove the cause of action which he set forth in his bill of particulars; *second*, that he did not prove any cause of action.

The plaintiff alleged in his bill of particulars, among other things, as follows:

"That some time in the month of April, 1884, plaintiff contracted with the defendant to cut and bind wheat for the defendant, for which the defendant was to pay the plaintiff at the rate of \$1.50 per acre; that in pursuance to said agreement plaintiff cut and bound 38 acres, amounting to \$57, which defendant refused to pay."

The evidence on the trial showed that the defendant had about 56½ acres of wheat, in three separate pieces; that the plaintiff cut and bound two of such pieces, or 36½ acres, and did not cut or bind the other piece, which contained about 20 acres. The plaintiff in error, defendant below, now claims that the plaintiff alleged in his bill of particulars, in effect, that he agreed to cut and bind *all* the defendant's wheat, while his proof introduced on the trial showed that he agreed to cut and bind just 20 acres of such wheat, and no more; and therefore he claims that there was a variance between the plaintiff's allegations and his proof, and therefore that he cannot recover. We perceive no such variance. The plaintiff *did not allege* that he agreed to cut and bind *all* the defendant's wheat, but simply alleged that he "contracted with the defendant to cut and bind wheat for defendant," without alleging any amount; and the evidence not only proved that the plaintiff agreed "to cut and bind wheat for the defendant," but also proved that he did in fact cut and bind the same. The allegation that the "plaintiff contracted with the defendant to cut and bind wheat for the defendant," is not an allegation that the plaintiff contracted to cut and bind *all* the wheat which the defendant owned. In our opinion, there is clearly no variance between the plaintiff's allegations and his proof.

The plaintiff in error, defendant below, further claims that the plaintiff below did not prove any cause of action; and this claim is founded upon the theory that the plaintiff agreed to cut and bind *all* the defendant's wheat, but failed to do so. The question as to what the plaintiff agreed to do is a question of fact, which was submitted to the jury upon the evidence, and the jury found against the defendant and in favor of the plaintiff, and the court below sustained the verdict of the jury; and while the evidence was conflicting and contradictory, and possibly the preponderance thereof in favor of the defendant, yet we think there was sufficient evidence to sustain the verdict of the jury, and hence their verdict must be sustained. The plaintiff himself testified that he did not agree to cut and bind *all* the defendant's wheat; that he refused to make any such agreement; and refused, particularly, to agree to cut and bind the 20-acre piece. Indeed, he testified that he did not agree to cut and bind more than 20 acres, but that he did in fact cut and bind 36½ acres.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 315)

## WARD v. CLARK.

Filed May 7, 1886.

## JUSTICE OF THE PEACE—APPOINTMENT TO FILL VACANCY—ELECTION.

The governor appointed the defendant in August, 1885, to fill a vacancy in the office of justice of the peace of the city of Topeka. The plaintiff was voted for, and claimed to have been elected, to fill such vacancy, at the general election held in November, 1885. *Held*, that the vacancy could not be filled by an election before the regular city election held in April, 1886, to which time the defendant was entitled to hold the office under the appointment of the governor, and until his successor then chosen had qualified.

Original proceedings in the nature of *quo warranto*.

David Overmeyer and Joseph T. Ward, for plaintiff.

Webb & Spencer and J. H. Dinkgrave, for defendant.

JOHNSTON, J. This is an action in the nature of *quo warranto*, brought by Joseph T. Ward to try the title to the office of justice of the peace of the city of Topeka, which office, he alleges, has been usurped, and is unlawfully held, by the defendant, H. S. Clark. The case has been presented here upon the defendant's demurrer to the petition of the plaintiff.

From the petition it appears that J. M. Matheny was elected to the office in question in April, 1885, and resigned it in August of that year. Immediately upon the resignation of Matheny, and more than 30 days preceding the general election in November, 1886, the defendant, H. S. Clark, was appointed by the governor to fill the vacancy caused by such resignation. At the general election held on November 3, 1885, the plaintiff was voted for, and received the highest number of votes, for justice of the peace, to fill out the unexpired term for which Matheny was elected. The plaintiff claims the office by virtue of this election, contending that under the provisions of section 11 of article 3 of the constitution it was a proper election to fill the vacancy occasioned by the resignation of Matheny, while the defendant claims that the vacancy could not be filled by election until the regular city election held in April, 1886, and that he was entitled to hold the office by virtue of the appointment of the governor until that time. The question raised by the pleadings has been practically determined by former decisions of this court. In section 11 of article 3 of the constitution it is provided that, "in case of vacancy in any judicial office, it shall be filled by appointment of the governor until the next regular election that shall occur more than 30 days after such vacancy shall have happened." The phrase "next regular election" found in the above provision has been defined to be "the next election held conformably to established rule or law," and also "the regular election prescribed by law for the election of a particular officer to be elected." *State v. Cobb*, 2 Kan. 32; *Matthews v. County Com'rs of Shawnee Co.*, 34 Kan. —; S. C. 9 Pac. Rep. 765.

It is true that the statute provided for the annual election of town-

ship officers at the general election held in November, 1885, (chapter 195, Sess. Laws 1885;) and if the particular office in contest was a township office, or one to be filled at the annual township election, the contention of the plaintiff would be correct. But we must take notice of the fact that Topeka is a city of the first class, with a population in excess of 15,000. In section 48 of chapter 110 of the General Statutes of 1868 it is enacted that in cities having more than 2,000 inhabitants justices of the peace shall be elected at the regular city election. This is a valid statute, and still remains in force. *Borton v. Buck*, 8 Kan. 302; *State v. Farrell*, 20 Kan. 214. It therefore furnishes the rule for determining the time when the vacancy in question should be filled, and settles it that the regular city election in 1886 was the next regular election occurring more than 30 days after the resignation of Matheny; and therefore the defendant was entitled to hold the office as justice of the peace until that time, and until his successor then chosen had qualified. Nothing in the constitution requires that justices of the peace shall be elected at a general election, nor that all justices of the peace shall be chosen at the same election. The legislature has full power to classify the cities and townships of the state, and to prescribe that the election of justices of the peace in cities of the first class shall be held at one time, in cities of the second class at another time, and in townships outside of such cities at still another time, or to make any other like classification of the townships which it may deem proper. A law fixing the time for the election of justices of the peace in any such class, as has been done by said section 48, and which operates alike upon all townships coming within that class, is a general law, and not obnoxious to the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. It follows that no election for the office of justice of the peace could have been or was held in the city of Topeka at the general election in November, 1885, and therefore the demurrer of the defendant must be sustained.

(All the justices concurring.)

(35 Kan. 310)

### SYMNS and others v. SCHOTTEN and others.

Filed May 7, 1886.

#### 1. SALE—STOPPAGE IN TRANSITU—CARRIER.

The vendor's right of stoppage *in transitu* continues, not only while the goods are being carried to the point of destination, but also until they have actually reached the possession of the vendee.<sup>1</sup>

#### 2. SAME—GOODS HELD FOR FREIGHT.

Where the goods are removed by the railroad company, and placed in its warehouse in its capacity as carrier, to await payment of the freight charges and a delivery to the vendee, the implication of the law is that the goods are still in transit, and subject to the vendor's right of stoppage.

<sup>1</sup>See note at end of case.

Error from Lyon county.

This action was begun by A. B. Symns & Co. to recover from the Emporia Mercantile Association \$185.05, for merchandise sold and delivered to the defendant. At the same time the plaintiffs caused an attachment to be issued and levied upon certain goods which were found in the possession of the Atchison, Topeka & Santa Fe Railroad Company, and which had been shipped to the defendant over its road. Afterwards, Wm. Schotten & Co. intervened in the action, claiming that the attached goods were purchased from them by the Emporia Mercantile Association on credit, and that after they were shipped, and before delivery, the defendant became insolvent. Notice of these facts was given to the railroad company, and they demanded the goods under the right of stoppage *in transitu*. By reason of the notice and demand, Wm. Schotten & Co. claimed the goods, while the plaintiff claimed them under the attachment proceedings. Default was made by the mercantile association, and the cause was tried between the other parties, upon the following agreed statement of facts:

"It is hereby stipulated and agreed between said plaintiffs and said Wm. Schotten & Co. that the following are the facts in this case, so far as these two parties are concerned:

"(1) Both said parties are copartners, as alleged.

"(2) The bill of goods in controversy, viz.:

10 cases of coffee, 1 lb. packages, Philadelphia,	\$155 00
1 drum of keg Y pepper, Philadelphia,	15 00
10 lbs. hops, Philadelphia,	3 50
	<hr/>
	\$173 50

—Were ordered by said defendant, the Emporia Mercantile Association, just previous to October 16, 1883, of said Wm. Schotten & Co., and on October 16, 1883, sold by said Wm. Schotten & Co. on said order to said association, and by said Wm. Schotten & Co., who then were and now are wholesale merchants at St. Louis, Mo., shipped by railroad and common carriers from said city of St. Louis to the city of Emporia, Lyon county, Kansas, consigned to said association there, a corporation doing a retail grocery business at Emporia, aforesaid; that the Atchison, Topeka & Santa Fe Railroad Company was and is a common carrier for the last and western part of the lines of railroad over which said goods were shipped. Said goods arrived at the depot of said A., T. & S. F. R. R. Co., at Emporia, on October 22, 1883. They were unloaded, and taken out of the cars in which they came, and were placed in the warehouse of the R. R. Co.; and on October 23, 1883, the attachment in this suit was issued, and the notice of garnishment issued, and both served on the same day.

"(3) Said A., T. & S. F. R. R. Co. declined to recognize the attachment, and refused to deliver possession of said goods to the sheriff, and never did part with the possession thereof until November 29, 1883, as appears in finding No. 6, except as shown by finding No. 9.

"(4) That on October 25, 1883, the agent of the said A., T. & S. F. R. R. Co. notified said Wm. Schotten & Co. of such suit, and closed said notice in these words: 'And we demand that you take such steps to enforce and protect your rights in said action as to you may seem proper. R. E. TORRINGTON, Agt. A., T. & S. F. R. R.'

"(5) That on October 27, 1883, said Wm. Schotten & Co. sent to their attorneys, Buck & Feighan, the bill attached to their answer, and directed them to claim the said goods; and pursuant to said instructions, on November 1, 1883, said Buck & Feighan, for said Wm. Schotten & Co., found said goods in the warehouse of said A., T. & S. F. R. R. Co., at Emporia, Kan., and then and there informed said company that said association had become insolvent, and had not paid for said goods, and that they claimed the goods by their right of stoppage *in transitu*; and then and there demanded said goods, and warned said R. R. Company not to deliver them either to said association or the said sheriff, or any one else.

"(6) That on November 29, 1883, all the parties hereto and said R. R. Co. stipulated for sale of goods, the proceeds to be held in place of the goods, as appears by written stipulation on file herein; and said Railroad Co. then and there delivered said goods to Thomas & Jones, who paid therefor \$152, and paid thereon railroad freight and charges, \$8.88; leaving net proceeds, in the sum of \$143.12, to be disposed of under said claims of the said A. B. Symms & Co. and Wm. Schotten & Co.

"(7) That between the time of said sale and said attachment said association became, and ever since has been, insolvent.

"(8) That no part of said bill of goods has ever been paid, and Wm. Schotten & Co. did not hear of said insolvency until after said goods were shipped, and while *in transitu*.

"(9) At the time of levy the sheriff went into the room where the goods were in the R. R. warehouse, and sorted them over so as to identify them, and then levied on them, and for said plaintiffs tendered to the R. R. Co. the freight charges, which was refused. Both the attachment and garnishment were in due form of law in all respects. The goods were never delivered to Emporia Mercantile Association, unless above facts show delivery."

The court found as conclusions of law:

"First, that said Wm. Schotten & Co. are entitled to said sum of money, (\$143.12,) by their right of stoppage *in transitu*, relieved of all claim or lien on account of said attachment and garnishment; second, as a matter of fact and law, that there is now due from said defendant, the Emporia Mercantile Association, to said defts., Wm. Schotten & Co., the sum of \$253.20."

The court rendered judgment against the mercantile association for that sum, and also adjudged that the \$143.12, the net proceeds of the goods in controversy, be applied on the judgment. The plaintiff excepted to the conclusions of law, and to the judgment, and brings the case here.

*Kellogg & Sedgwick*, for plaintiffs in error.

*Buck & Feighan*, for defendants in error.

JOHNSTON, J. The only question to be decided in this case is whether Wm. Schotten & Co., who interpleaded in the action, had a right, under the facts, to reclaim the goods which they had sold to the Emporia Mercantile Association. It is agreed that the goods were sold on credit, and that after the sale, and before their arrival at the point of destination, the consignee became insolvent. The right of the vendors to repossess themselves of the goods at any time while they were on the road, and prior to their arrival at Emporia, is conceded. But it is claimed that because the goods had reached the point to which they were shipped, and had been unloaded from

the cars, and placed in the warehouse of the railroad company, the *transitus* was at an end, and the vendors' right of stoppage was extinguished. The right of stoppage *in transitu* is not so limited a one as the plaintiff would make it. It is one which the law favors, and is said to be founded upon the just principle that one man's property shall not be applied in payment of another man's debts, and the courts have been inclined to encourage, rather than to restrict, the exercise of the right. The general rule is that the vendor may resume possession of the goods at any time before they actually reach the possession of the vendee. This right continues in the vendor, not only while the goods are being carried to the place of consignment, but may be exercised at any time until the delivery to the vendee or his agent has been completed. The unloading of the goods, and the placing of them in the warehouse of the railroad company, does not necessarily terminate the *transitus*, nor put an end to the right of stoppage; so long as they remain in the hands of the carrier or middle-men as such, the right does not cease. There may be cases where the possession of the carrier or warehouseman, after the final destination is reached, will, owing to the agreement of the parties, or the special circumstances of the case, be regarded as the possession of the vendee, and so put an end to the vendor's right of stoppage. But where goods are consigned and shipped in the ordinary way, and the railroad company which brings them to the point of delivery, in performance of its duty as carrier, unloads and places the goods in its warehouse awaiting the payment of freight charges before delivery to the vendee, the presumption will be that the goods are still in transit, and that the right of stoppage yet remains in the vendor. In an Ohio case quite analogous to the one at bar, certain goods that had been consigned and shipped in the usual way were transferred by the railroad company to its warehouse at the station to which the goods were consigned, and near to which the vendee resided and did business, there to await the payment by him of the charges thereon as a condition precedent to their removal and delivery at his business house; and it was held that the transfer did not, *ipso facto*, constitute a delivery of possession to the vendee, but was to be regarded as a reasonable exercise of the duty by the carrier in the course of their transit, and as connected with the original employment of the company as agent of the vendor to transport and deliver, and therefore did not preclude the vendor's right of stoppage *in transitu*. It was recognized that in some instances the carrier or middle-man might become the agent of the vendee, and hold possession for the vendee, but it was said that such "agency will not be implied from the carrier's original employment, and can arise only by showing affirmatively some arrangement or understanding to that effect other than the general words of an ordinary consignment." *Calahan v. Babcock*, 21 Ohio St. 281. There is no conflicting authority upon the question presented here, and no necessity for a review of the decided cases. Among

many others which might be cited in support of the views expressed, we refer to the following: *Rucker v. Donovan*, 13 Kan. 251; *O'Neil v. Garrett*, 6 Iowa, 480; *Buckley v. Furniss*, 15 Wend. 137; *Covell v. Hitchcock*, 23 Wend. 611; *Harris v. Pratt*, 17 N. Y. 249; *Loeb v. Peters*, 63 Ala. 243; *Newhall v. Vargas*, 13 Me. 93; *Inslee v. Lane*, 57 N. H. 454; *Hoover v. Tibbits*, 13 Wis. 79; *Atkins v. Colby*, 20 N. H. 155; *Blackman v. Pierce*, 23 Cal. 508.

The record of this case discloses nothing from which we might infer that the carrier was the agent of the vendee. The goods were sold and consigned in the ordinary course of business between merchants, and when they arrived at Emporia they were taken out of the cars by the railroad company, and placed in its warehouse, and there held, in its character as carrier, to await the payment of charges and a delivery to the consignee. The railroad company had not delivered the goods to the vendee, and in that respect its duty as carrier was incomplete. The freight was never paid, nor have the goods ever reached the possession of the vendee. The *transitus*, therefore, had not terminated, and the vendor's right of stoppage continued notwithstanding the seizure made under the attachment sued out by the plaintiff. The cause was rightly decided by the district court, and its judgment will be affirmed.

(All the justices concurring.)

#### NOTE.

A cargo of clay was shipped by H. on board the schooner *E. H. Pray*, under a bill of lading providing for its delivery to P. Before the delivery of the clay H. appeared, and, asserting the insolvency of the libellant, and the non-payment of the price, ordered the master not to deliver the clay to P., which direction the master obeyed. P. thereupon brought suit on the bill of lading against the vessel to recover damages for non-delivery of cargo. Held, that the assertion of the fact of insolvency by the vendor, made in good faith and believed by the master, coupled with the fact that the goods had not been paid for or the price secured, and the other fact that the stoppage was during the continuance of the *transitus*, justified the master in delivering the cargo to the vendor, and gave the vendee no right of action against the vessel. *The E. H. Pray*, 27 Fed. Rep. —.

The right of stoppage *in transitu* exists until the goods are delivered to the buyer, or possession, actual or constructive, is taken by him. *Hall v. Dimond*, (N. H.) 3 Atl. Rep. 423.

The seizure of personal property, consigned to purchasers, by virtue of process against their goods, does not destroy the vendor's right of stoppage *in transitu*. *Sherman v. Ru-gee*, (Wis.) 13 N. W. Rep. 241.

The vendor's right of stoppage *in transitu* is not defeated by the arrival of the goods at the place of destination, but is only terminated by the goods passing into the actual or constructive possession of the vendee. *Greve v. Dunham*, (Iowa,) 14 N. W. Rep. 130.

The right of stoppage *in transitu* may be asserted by the vendor of goods at any time before their delivery to the vendee by the carrier. *United States Wind Engine & Pump Co. v. Oliver*, (Neb.) 21 N. W. Rep. 463.

Where a wholesale merchant has sold goods to a retail dealer on six months' time, such merchant cannot claim the right to stop said goods in transit without showing that the purchaser is insolvent, and that the goods have not been delivered to him. *Walsh v. Blakely*, (Mont.) 9 Pac. Rep. 809.

When goods are sold on the condition that title shall not pass until they are paid for, the vendor retains the right to stoppage *in transitu*, as against the vendee, or an innocent third person who purchases of the vendee before the arrival of the bill of lading or the goods. *Pattison v. Culton*, 33 Ind. 240.

It is said that the right of stoppage *in transitu* is lost if the purchaser has sold the goods, and indorsed the bill of lading to a subpurchaser for value in good faith. *Newhall v. Central Pac. R. Co.*, 51 Cal. 345.

## SUPREME COURT OF OREGON.

(13 Or. 410)

PAGE and others v. SMITH.

Filed May 3, 1886.

## 1. REPLEVIN—PLEADING—ATTACHMENT—SALE ON EXECUTION—CIVIL CODE, § 85.

In an action of replevin, a defendant relying upon the purchase of the chattel in dispute at a sheriff's sale, under an attachment issued by the justice's court, must, under section 85 of the Civil Code, allege in his answer, the commencement of the action in the particular court, specify the claim on which it was brought so as to show the jurisdiction of that court, allege that the judgment was duly given, that an affidavit was duly made and undertaking given in compliance with the statute, and that execution was issued thereon.

## 2. SALE—DELIVERY—EVIDENCE.

Delivery of goods marked with the name of the party to whom they are delivered may create a strong inference of sale to the party receiving them, but the act may be susceptible of explanation consistently with the ownership of the party delivering.

Appeal from Gilliam county.

H. C. Condon, for appellant, James W. Smith.

No appearance for respondents, S. B. Page and others.

THAYER, J. The appellant commenced an action in the court below to recover the possession of a certain safe. The complaint was in the usual form of actions of that character. The respondents, answering, denied the allegations of the complaint, and set up as a further defense the following new matter:

"For a second and separate answer defendant alleges that the plaintiffs are estopped from alleging that they are the owners, and entitled to the possession, of the safe, for the reason that, prior to the time that said safe came into the possession of defendant, said plaintiffs made some arrangements or contract with one J. Linder for the sale and delivery to said Linder of the said safe; and that said plaintiffs, in pursuance of said contract of sale, caused the name of said Linder to be conspicuously painted in a permanent manner upon the front of said safe, that being the manner in which it is usual and customary for the names of owners of safes to be affixed, and did ship and deliver to said Linder the said safe; that said safe was seized in attachment as the property of the said Linder in an action in justice's court, in which one August Buckler was plaintiff and said Linder was defendant; the judgment was duly rendered against Linder, and execution issued thereon; and that, by virtue of said execution, the safe was duly advertised for sale, and sold to the defendant, who, relying upon the fact that said plaintiffs had caused the name of said Linder to be so affixed to said safe as to indicate that Linder was the owner thereof, and then and there being in ignorance of what the contract between said plaintiffs and said Linder was, was thereby induced to believe, and did believe, that the said Linder was the owner thereof; and then and there this defendant, for a valuable consideration, to-wit, the sum of fifty-five dollars, became the purchaser and owner thereof."

The respondents demurred to the further defense upon the grounds, in substance, that the facts therein set forth were insufficient as a defense to the action. The circuit court sustained the demurrer. The

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case was subsequently tried upon the issue of fact joined therein, and it appears from the transcript that a stipulation of certain facts, signed by the attorneys for the respective parties, was read in evidence upon the trial. A copy of the stipulation is sent here with the transcript, but no bill of exceptions appears to have been settled and filed, nor has any authentic statement as to what took place at the trial been sent up. The court found that the respondents were the owners, and entitled to the immediate possession, of the said safe, and adjudged that they recover the possession thereof, or the value in case a delivery could not be had.

The only question which can be considered upon the appeal is the ruling upon the demurrer. The respondents' counsel has produced in his brief what he claims was introduced as evidence upon the trial. It purports to be a copy of a writing addressed to the respondents in their firm name, signed by the said J. Linder, requesting the former to ship to the latter a safe, and it contains terms of agreement upon which he was to receive it. Linder was not to permit it to be removed, etc., and was to pay a certain monthly rent, and, after a while, if he performed the conditions of the agreement, the respondents would sell him the safe for one dollar, but until then it should remain the property of the respondents. It was a transaction which the courts of the country are somewhat divided as to the effect of,—some claiming that it is a lease or bailment of the property, and others that it is a sale with a mortgage back; but that question does not arise in the case, as the evidence upon the subject is not legally authenticated. All we know is that the court took evidence and decided the case as before stated, and the presumptions are that the evidence was sufficient to authorize the rendition of said judgment.

I do not think the new matter in the answer constituted an estoppel, and, besides, it was not good in form. Setting out all the facts creates what used to be termed "an estoppel against an estoppel," which set the matter at large. The appellant, instead of stating that the respondents made some arrangement or contract with Linder for the sale and delivery to Linder of the safe, should have stated "that the respondents ought not to be admitted to allege that they were the owners of it, for that," etc.; inserting the facts in regard to the painting of the name upon it. The plea of estoppel neither admits nor denies the facts alleged in the complaint, but denies the right of the plaintiff to *allege* them. The matter set out created no estoppel. Shipping the safe to Linder, and painting his name upon it, may have created a strong inference that the respondents had sold it to him; but the act was susceptible of explanation consistently with the respondents' ownership of it notwithstanding. If A. were to let B. have his horse to use, the possession by the latter might be *prima facie* evidence that he was the owner of the animal; but it would not preclude the former from reclaiming it, even if he had put B.'s brand onto it before delivery. That would not be equivalent to an unqualified

statement upon the part of A. that B. did own the horse; it would be no more than a circumstance tending to show a sale from A. to B. Before it can be claimed that a party shall not be permitted to falsify even his own declaration, act, or omission, it must be shown that he thereby intentionally and deliberately led the other party to believe a particular thing true, and to act upon such belief, (sub. 4, § 765, Civil Code;) and his answer to a pleading in a case must show that such was the fact. The appellant's answer falls far short of this; and, besides, the part of the new matter of the answer in which the seizure of the safe on attachment is alleged is defective. The various proceedings authorizing the issuance of the attachment are not set out, nor is it stated therein that the attachment was duly issued.

Under the attachment law of this state, I think it necessary to allege, generally, at least, that an affidavit was duly made and undertaking given, in compliance with the statute authorizing the issuance of the attachment, before any right or benefit under it can be claimed. The subsequent allegations in the answer that judgment was duly rendered against Linder, and execution issued thereon, and that, by virtue of said execution, the safe was sold, were not a sufficient statement of the facts of the recovery of a valid judgment. They do not show that any action was commenced in any court. The statute has very much simplified the pleading of judgments of justices' courts, but I think it still necessary to allege the commencement of the action in the particular court, and to specify the claim upon which it is brought so as to show that the court had jurisdiction of the subject-matter. That, followed by an allegation that the judgment was duly given, would be sufficient, no doubt, under section 85 of the Civil Code. But here the pleader has not stated any of these things—merely states the seizure of the property on attachment in an action in justice's court in which one August Buckler was plaintiff and the said Linder was defendant; that judgment was duly rendered against Linder. This, certainly, was not sufficient to give the appellant a standing in the action upon which to defend against any right to the possession of the safe the respondents may have had.

I am of the opinion that the judgment appealed from should be affirmed.

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(13 Or. 406)

NICKLIN, Adm'r, v. HOBIN.

Filed May 8, 1886.

**1. INJUNCTION—JUDGMENT—JURISDICTION—APPEAL.**

An error in a judgment pronounced by a court having jurisdiction in the matter must be rectified by an appeal, and not by an injunction.

**2. SAME—JUDGMENT FOR COSTS.**

Judgment for costs was rendered on the motion of the attorney for one of the parties, with the consent of, or without objection from, the opposing attorney, who was alleged to have no authority to represent the adverse party. *Held*, upon appeal from a decree enjoining execution on the judgment, that,

the court having power to deal with the costs independently of the attorney's consent, the remedy of the party aggrieved was by appeal, and that the decree should be reversed, and the bill dismissed.

*A. R. Coleman*, for appellant, Frank Hobin.

*J. G. Chapman*, for respondent, A. Nicklin, Adm'r.

LORD, J. This is an appeal from a decree of the circuit court of Multnomah county, rendered on the ninth day of January, 1886, whereby appellant was perpetually enjoined from issuing execution upon, or enforcing the collection of, a certain judgment of the circuit court of said county, rendered on the sixth day of November, 1879, in an action wherein Paul M. Brenan was plaintiff, and appellant was defendant, which judgment was in favor of this appellant for costs and disbursements, taxed at \$62.95. The plaintiff, as administrator of Brenan's estate, filed the complaint in this suit, alleging in substance that, in 1878, Brenan, as plaintiff in an action in a justice's court, obtained judgment against Frank Hobin, from which judgment said Hobin appealed to the circuit court, where a jury trial was had, and a verdict for one dollar rendered in favor of the plaintiff, Brenan; that afterwards, on the fifth day of November, 1879, said Hobin, "through the inadvertence or mistake of one J. H. Reed, who appeared specially at the time as attorney for and on behalf of said Paul M. Brenan, at the instance of H. T. Bingham, Esq., who was then regular attorney of Paul M. Brenan in said action, took a judgment against said Paul M. Brenan for costs and disbursements, amounting to \$62.95." The complaint then alleges that judgment was rendered on the verdict in favor of Brenan for one dollar, and one dollar costs, and for Hobin for his costs and disbursements, taxed at said sum of \$62.95; that Reed, without authority, consented that the judgment be so rendered; and that Hobin's attorney knew at the time that they were not entitled to such a judgment upon the verdict; that Reed died insolvent in the year 1883. The complaint also alleges that on the twentieth of February, 1882, Hobin had an execution issued on said judgment, and that then Brenan filed a motion in the circuit court to have this execution returned and quashed, and the judgment vacated; that the writ was returned unsatisfied, but the motion was never heard or disposed of; that Hobin is threatening to have another execution issued upon said judgment against the property belonging to Brenan's estate. Wherefore plaintiff prayed for injunction, etc.

The plaintiff claims that the object of the suit is not to correct any error or irregularity of the court below, but to relieve from the unauthorized act of an attorney by whose consent the judgment for costs was rendered. This assumes that without such consent the court would have been without jurisdiction to render such judgment for costs, and as such consent was obtained by one unauthorized to give it, the court was without jurisdiction, or had no authority to pronounce such

judgment. The record shows that the court had jurisdiction of the subject-matter and the parties; and, after trial, a verdict was obtained; whereupon the attorney for the defendant here moved for judgment for costs, to which the attorney, alleged to have been without authority to represent the adverse party, consented, or made no objection, and the court rendered the judgment from which relief is now sought.

Now, although it may be true that the amount of costs taxed as allowed by the court may be wrong, still it was but an error of judgment, but not a defect of jurisdiction. The vice of the argument lies in assuming that the court derived its power to act or to pronounce such judgment from the consent of such attorney. It is true a different result or judgment might have been obtained had objections been interposed or the court instructed by an argument; but that does not show a want of jurisdiction, but only how an error in the judgment might perhaps have been averted.

But, says counsel in his brief, "the court had no jurisdiction to allow costs to the defendant, even upon the *consent* of the regular attorney, and the judgment is void." As we view it, the consent of the attorney has nothing to do with the jurisdiction of the court in such case. The cause was one the court had a right to try, and the parties were properly present by due process, and the power of the court to hear and determine all matters, including costs which might arise in the trial of the cause, was complete, and its jurisdiction unaffected one way or the other by the *consent* suggested. The question whether a judgment is right or wrong is a very different one from whether it is valid or void. Although it is the aim of courts to decide rightly, yet the power to decide necessarily carries with it the power to decide wrong as well as right; and where a court has jurisdiction, the judgment or determination is binding and obligatory until reversed, without reference to the question whether it is right or wrong; "nor is it any ground for disregarding a judicial determination that one party has got a great deal more than was justly due him." BRONSON, J., in *Supervisors of Onondaga Co. v. Briggs*, 2 Denio, 34. It may be true that there was error in the judgment, and, if there was, an appeal would have corrected the error; but this is without the province of a court of equity.

The judgment must be reversed, and the bill dismissed.

## SUPREME COURT OF UTAH.

(4 Utah, 369)

## DUCHENEAU v. HOUSE, Justice of the Peace.

Filed April 24, 1886.

## 1. JUSTICE OF THE PEACE—JURISDICTION—TRESPASS—QUESTION OF TITLE—CONSTITUTIONAL LAW.

Under the organic act, (9 St. at Large, 458, § 9,) the "Poland Bill," (1 Supp. Rev. St. U. S. 105, c. 469,) and Rev. St. U. S. 1878, (2d Ed.) § 1867, p. 330, justices of the peace cannot proceed with any case involving the title to land, even though the defendant's answer that such question of title is involved in the determination be not verified upon oath, as required by the territorial Code of Civil Procedure, the United States Statutes being paramount, and beyond direct or indirect modification by territorial legislatures.

## 2. SAME—TITLE TO LAND.

Where an action involves a question of title to land, the proper course, under the territorial Code of Civil Procedure, is for the justice to transfer the cause to the district court.

## 3. SAME—APPEAL.

Where a justice has proceeded to the determination of an action involving a question of title to land, the district court can only try, upon appeal, the question of the jurisdiction of the justice, and not the question of title.

## 4. PROHIBITION, WRIT OF—ISSUANCE—JUDICIAL AND MINISTERIAL FUNCTIONS—EXECUTION.

Writ of prohibition, under the territorial statute, (Laws 1884, p. 326, § 982,) may be issued against one exercising either judicial or ministerial functions, and may competently be issued to stay a justice from issuing an execution.

## 5. SAME—POWER OF COURT—CONSTITUTIONAL LAW.

The territorial legislature, in pursuance of its authority given by the organic act to legislate upon all "rightful subjects of legislation," has the right, as occasion may arise, to create new offenses, new subjects for judicial investigation, and new ways and means to enforce the authority of the courts and officers, and may provide for the issuance of writs of prohibition to arrest the exercise of ministerial functions.

On prohibition.

Appeal from First district.

C. S. Varian, for appellant.

A. R. Heywood and J. N. Kimball, for respondent.

BOREMAN, J. The Corinne Mill Canal & Stock Company, as plaintiff, instituted an action of trespass in the justice's court, before HIRAM HOUSE, a justice of the peace, against Charles Ducheneau, the respondent herein, as defendant in that action, and alleged that said company was the owner and in possession of certain real estate. The defendant therein, said Ducheneau, answered denying that said company was either the owner or in possession of the land, or any portion of it, or that it ever had been; and demanding a dismissal of the action, as the justice had no jurisdiction where the title of real estate was in question. Notwithstanding this demand, and the raising of the question as to the title to the real estate, the justice proceeded, without notice to the defendant in that action, to enter up judgment

against him. Thereupon said Ducheneau obtained from the district court an alternative writ of prohibition to arrest all further proceedings by the justice. A motion to quash the writ was, by the district court, overruled, and, after a hearing, a peremptory writ of prohibition was ordered. From this decision of the district court the appellant has brought the case to this court.

The appellant, said justice, maintains that as it does not appear from the affidavit on which the writ issued that the answer of said Ducheneau to the complaint in the justice's court was under oath, the writ should have been quashed as being unauthorized. The organic act of this territory (9 St. at Large, 453, § 9) provides "that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute." In what is termed the "Poland Bill," approved June 23, 1874, it is provided that the district courts shall have exclusive original jurisdiction "in all controversies where the title, possession, or boundaries of land \* \* \* shall be in dispute." 1 Supp. Rev. St. U. S. 105, c. 469. In the Revised Statutes of the United States of 1878, it is further provided that "no justices of the peace in any territory shall have jurisdiction of any case in which the title to lands, or the boundary thereof, in anywise comes in question." Rev. St. U. S. (2d Ed.) § 1867, p. 330. Our territorial Code of Civil Procedure makes an additional requirement not found in the United States Statutes, namely: That "if it appear from the answer of the defendant, *verified by his oath*, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real estate," the justice must suspend proceedings, and certify the case to the district court, etc.

In neither of the provisions quoted from the United States Statutes is there anything requiring the answer of the defendant in the action before the justice to be under oath. If we should now say that the United States Statutes shall have no force unless the defendant comply also with a territorial statute, we recognize the right and power in the territorial legislature to render nugatory, or to limit the enforcement of, a United States statute. If the legislature, in this indirect way, has power to annul and defeat a United States statute, we can see no reason why it could not do so in a direct manner by repeal; and if the legislature have this power in one instance to annul or defeat a law of congress, by loading it with other requirements not contemplated in the congressional statute, it has the right to do so in every case; and thus all statutory enactments of the United States would be subject to annulment or defeat by territorial statutes. Such a proposition as recognizes the right of the legislature to weigh down a congressional statute by making its enforcement depend upon compliance with territorial statute could not be entertained by the court. The laws of congress are, under the constitution, supreme, and the legislature has no power to require that the question of title or pos-

session must be raised by sworn answer; nor has it even the power to require it to be raised by answer at all, either sworn to or not sworn to. It might be raised in the complaint. One of the provisions quoted says that if it "in anywise comes in question" the justice cannot hear the case, and to do so is not an excess, but it is wholly outside of his jurisdiction. It is not within the scope of the general jurisdiction, or of any special jurisdiction, of the justice, to proceed with the case after the title or possession comes in question. To proceed to judgment is not simple error committed while acting within his jurisdiction, but it is assuming to act wholly outside of his authority, and a judgment so rendered is void.

The case of *Langford v. Monteith*, 102 U. S. 145, in no way conflicts with this view of the law. In that case the record showed that the answer was sworn to in accordance with the Idaho statute, and the supreme court of the United States simply held that as the issue as to title to real estate was raised by the answer, sworn to by defendant, the justice's court should have certified the case to the district court. The court did not decide that to raise the question the answer should be sworn to. There was no such point in the case. We have no reason to conclude, from anything that appears in that case, that the same ruling would not have been made had the answer not been sworn to.

The fact that the respondent asked a dismissal of the case, instead of a transfer to the district court, did not relieve the appellant, the justice, from the responsibility of failing to obey and follow the law of congress. The title to real estate came in question, and it was his duty to, at least, refuse to proceed to judgment. We see no reason why the justice could not have certified the case to the district court under our territorial Code of Civil Procedure; but perhaps that question is not necessarily involved in the decision of this case. Yet the justice did not so certify it, but proceeded to judgment in his own court.

The appellant urges that respondent had a "plain, speedy, and adequate remedy" by way of appeal, if such judgment of the justice was not satisfactory. An appeal to the district court would not have enabled the parties to have had the question of title, or of possession, tried in the district court; as that court could only have dismissed the case, "because there could have been no lawful trial before the justice." *Langford v. Monteith*, 102 U. S. 145. An appeal would have been, therefore, only an empty form, and would have settled nothing, except that there could be "no lawful trial before the justice;" and hence none before the district court. Actions in court are for the settlement of some matter in dispute, and not to compel parties to submit to the expense and trouble of going through certain forms, with no beneficial object in view, and before an officer whose final decision is utterly void, and of no binding force. They have the right to be saved from such annoyance and vexation, and to have

a tribunal acting without jurisdiction prevented from harassing them by suits and judgments which settle nothing, and accomplish no good purpose. An appeal in this case would have settled nothing. The merits of the controversy would have remained untouched. This is not like an appeal from the judgment of a justice when he was acting within the scope of the jurisdiction allotted to him by statute. In that class of cases, an appeal often gives a remedy by affording a trial of the merits of the case in the appellate court; or, at least, settling some question of dispute which was proper to be first tried and disposed of in the justice's court. But what relief can an appeal bring in a case which could not be examined into either in the appellate court or in the justice's court? It settles nothing, and does not prevent a party from again and again being harassed in the same way thereafter in regard to the same matter. An appeal only throws the parties back to the place they stood before the proceedings were instituted, and a party is not protected against being called again to answer to the same subject of complaint, and to again being forced through a useless trial, resulting in again being thrown back to their original position, to go through the same routine again.

Our statute regarding the writ of *certiorari* specifies an appeal as a remedy; but the provisions respecting the writ of prohibition omits the word "appeal" entirely. The sections regarding the *certiorari* likewise provide that such writ may issue when the tribunal, etc., exercising judicial functions has *exceeded* its jurisdiction; but the sections regarding prohibition provide that it may be issued, not only when the tribunal has exceeded its jurisdiction, but also when it acts "without" such jurisdiction. The former writ can also be issued only to a tribunal or person exercising judicial functions, whereas the statute says that prohibition can be issued against one exercising either judicial or ministerial functions. The former can be issued only when there is "no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy;" whereas the statute says that prohibition may be resorted to "where there is not a plain, speedy, and adequate remedy in the *ordinary course of law*." These differences in the statutes regarding these two writs show that different rules are in a variety of cases to control the issuance of these writs, and the last provision referred to shows that the remedy meant in the statute regarding prohibition is a remedy "in the ordinary course of law." Therefore, if *certiorari* would enable the respondent to reach the same result as the writ of prohibition, the respondent would not be compelled to resort to the former instead of the latter; for such is not a remedy "in the ordinary course of law," but is a special proceeding. But *certiorari* would not be an adequate remedy in this case. It might annul the judgment, but could not reach the ministerial act of issuing an execution, and to prevent that a resort would still have to be made to prohibition, or to a proceeding as for contempt in the district court.

It is insisted, however, that the writ of prohibition should not have issued, because the only act left for the justice to perform was ministerial,—the issuing of an execution; and that the writ of prohibition could not issue to arrest the doing of a ministerial act, notwithstanding the language of the territorial statute that it was not within the power of the legislature to confer such authority on the district court, but it could only authorize the common-law writ. At common law the writ of prohibition could not generally issue to arrest the doing of a merely ministerial act. But the supreme court of the United States, in the absence of any statute, recognizes that the writ may issue, even after sentence and judgment, where something remains to be done "which the court or party to whom the writ was directed might do, and probably would have done; as the collection of costs, or otherwise enforcing the sentence." *U. S. v. Hoffman*, 4 Wall. 162, 163; High, Extr. Rem. § 774. See, also, 3 Term R. 4; 3 Bl. Comm. (Sharswood,) 112, note 17. We, however, have a territorial statute which provides for its issuance to arrest the exercise of ministerial functions. Laws 1884, p. 326, § 982.

The district courts have general common-law and chancery jurisdiction, and that covers about everything of a civil or criminal nature not expressly committed to some other tribunal; *Ferris v. Higley*, 20 Wall. 375. We can readily see that this general jurisdiction would embrace the common-law writ of prohibition, and that the legislature could in no way deprive the district courts of such jurisdiction. But the legislature, in pursuance of its authority given by the organic act to legislate upon all "rightful subjects of legislation," has seen fit, and has the undoubted right, as occasions arise, to create new offenses, new subjects for judicial investigation, and new ways and means to enforce the authority of the courts and officers, and we can see no reason to conclude that the giving of additional power to the writ of prohibition was not a "rightful subject of legislation." If our charter (the organic act, or any subsequent act of congress) had specified, as is done in the constitution of California, that the district courts could issue writs of prohibition, it might be taken that this power was intended to exclude a general power; that by specifying such writ the common-law writ was intended, and every other character of the writ excluded. *Farmers' Co-op. Union v. Thresher*, 62 Cal. 407; *Maurer v. Mitchell*, 53 Cal. 289. A similar view was taken by the supreme court of the United States. Congress empowered the supreme court to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," and the court held that the specifying of admiralty and maritime jurisdiction was the exclusion of authority to issue the writ in any other case. *Ex parte Easton*, 95 U. S. 77. But in our constitution or charter there are no such words of exclusion, and there is nothing whatever to confine the legislature to the common-law writ, to be issued by the courts of general jurisdiction. If the district courts were

courts of special or limited jurisdiction, there might be a question as to the power of the legislature; but such is not the case, while these courts have general jurisdiction.

We see no error in adjudging costs against the justice. It was he that was brought into court on the writ, and it was his acts which are in question. It was not a single error; it was an intentional disregard of a statute, in assuming an unauthorized jurisdiction. Code Civil Proc. § 914; *U. S. v. Schurz*, 102 U. S. 407, 408.

Let the judgment of the district court be affirmed.

POWERS, J., concurs. ZANE, C. J., dissents.

(4 Utah, 382)

JONES v. HOUSE, Justice of the Peace.

HUNSAKER v. SAME.

Filed April 24, 1886.

1. PROHIBITION, WRITS OF—SERVICE.

Under the Territorial Laws of 1884, pp. 201, 202, § 268, sub. 8, a writ of prohibition left at the defendant's usual place of abode, with his wife, is properly served.

2. SAME—HEARING—NOTICE.

The time for service of the alternative writ being left to the discretion of the court, the service is not void mere because of the shortness of notice of the hearing, and the defendant ought to apply for an extension of time; otherwise the court of review cannot infer that there was any abuse of the discretion allowed.

Appeals from First district.

*Richards & Rolapp*, for respondent.

*C. S. Varian*, for appellant.

BOREMAN, J. These were both cases of the issuance of the writ of prohibition. The facts and the questions of law are the same in these two cases as in the prohibition case of *Ducheneau v. House*, ante, 838, (decided at the present term,) except that in these cases now under consideration two questions are raised which are not found in the *Ducheneau Case*. It is claimed that in these two cases the service of the writ was void. Our statutes authorize the service of this writ as ordinary summons is served, and the summons can be served "on the defendant personally, or by leaving a certified copy thereof at his usual place of abode, with some suitable person of at least the age of fourteen." Laws 1884, pp. 201, 202, § 268, sub. 8. The return of the officer on the writ in each of these cases was, as to the objectionable part, as follows: "That I served the same by delivering a certified copy thereof at the usual place of abode of the within-named HIRAM HOUSE, at Corinne city, in Malad precinct, county of Box Elder, territory of Utah, with some suitable person, to-wit, with the wife of said HIRAM HOUSE, over the age of 14 years, on the first day of August, 1885."

The objection is that the service on the wife is not sufficient; that it should have been made on the justice personally. The appellant refers to the following cases to sustain his position, viz.: *Pennoyer v. Neff*, 95 U. S. 725 *et seq.*; *St. Clair v. Cox*, 106 U. S. 350; S. C. 1 Sup. Ct. Rep. 354; *Webster v. Reid*, 11 How. 460. We do not think that either of the cases supports the position of appellant. Service by publication in attachment suits does not affect property not attached, nor does it warrant a personal judgment; but such is not this case. The service of the writs was in accordance with the statute, and we do not think that such service is defective.

It is further objected that sufficient notice of the hearing, by service of the alternative writ, was not given, it being only three or four days prior thereto. This is a matter that is necessarily left to the sound discretion of the court or judge issuing the alternative writ. The appellant does not seem to have brought the attention of the lower court to this fact, nor applied for an extension of time, and the service is certainly not void merely because of the shortness of time. Nothing appears to show that there was any abuse of the discretion allowed to the court or judge. We necessarily conclude that there was nothing improper or injurious in the fact of so short a notice. The judgments in both cases are therefore affirmed.

POWERS, J., concurs. ZANE, C. J., dissents.

## SUPREME COURT OF KANSAS.

(35 Kan. 265)

## UNION PAC. RY. CO. v. BEATTY.

Filed May 7, 1886.

CORPORATIONS—AGENT—RAILROAD DIVISION SUPERINTENDENT EMPLOYING PHYSICIAN TO ATTEND TO PARTIES INJURED BY DERAILMENT OF TRAIN.

Where a railway passenger train is derailed, and some of the passengers are injured by inevitable accident, no obligation rests upon the company to furnish medical care and attention to the injured passengers; and the company cannot be made liable for such care and attention by the contract of the division superintendent, unless authority has been given him to commit it to such liability; and where a division superintendent employs a physician to attend upon passengers so injured, and the company denies his authority, and contests its liability under the employment, it is error for the court to instruct the jury that the division superintendent will be presumed to have such authority until the contrary appears.

Error from Clay county.

*J. P. Usher and Charles Monroe*, for plaintiff in error.

*J. S. Walker*, for defendant in error.

JOHNSTON, J. This proceeding is brought to reverse a judgment obtained against the Union Pacific Railway Company by Dr. G. F. Beatty for his services as a physician and surgeon, and for medicines alleged to have been rendered and furnished, upon the employment of the railway company. It appears that on June 11, 1883, a passenger train of the railway company was derailed at a point on the Kansas Central Division of the road, between Miltonvale and Clay Center, and that a number of the employes and passengers on the train were injured. At the instance of the station agent, and also of the locomotive engineer of the wrecked train, the plaintiff went to the point where the accident occurred, and there found eight persons suffering from injuries received in consequence of the accident, two of whom were the employes of the company. He states that six of the cases proved to be of but minor importance, while the injuries received by three of the passengers were of a more serious nature. The three last named were taken to Miltonvale, where the doctor continued to give them medical and surgical care and attention for 10 days thereafter. It further appears that, while the plaintiff and the station agent were on their way to the scene of the accident, the station agent was injured by the bursting of a torpedo which had been placed on the track, and the treatment of this injury was also included by the plaintiff in his charge against the company. The plaintiff offered proof tending to show that the division superintendent of the railway company was notified of the accident, and of the fact that the doctor was in attendance upon the persons who had been injured, and that he directed the station agent to take the injured persons to Miltonvale, and to continue the plaintiff as physician and surgeon in charge of them. He also attempted to prove that his employment by the

station agent and engineer was subsequently ratified by the division superintendent. That the plaintiff was requested by the station agent and engineer to attend and take charge of the injured persons seems not to be questioned, but the division superintendent denied that he ever authorized them to employ the plaintiff, or in any way ratified his employment. The plaintiff presented a bill for his services for \$250, which was referred to the general superintendent of the company, who rejected the claim, and in a letter to the plaintiff gave his reasons as follows:

"Referring to your claim of \$250 for services to passengers injured by train blowing off track on Kansas Central Division on night of June 11th, we do not consider that the company was responsible or in any fault for the accident; and, as you were not employed by the railway company to attend the injured passengers, your claim is respectfully declined."

The plaintiff recovered for his services to the passengers and employees the full amount of his claim.

At the trial in the district court, as well as here, the plaintiff below relied upon an employment by the division superintendent, and contended that that officer had authority, by virtue of his office, to bind the company for the medical and surgical service which he had rendered. The principal question in the case is in regard to the authority of the division superintendent in this respect. The court below, in the trial of the cause, proceeded upon the theory that it was within the general scope of the employment of the division superintendent to contract in behalf of the company for such services as were rendered by the plaintiff. Accordingly, the jury were instructed that the division superintendent would be *presumed* to have authority to employ the doctor, and to bind the company for the medical care and protection which he gave to the injured passengers and employees, until the contrary was made to appear. This was error. To support this position the case of *Pacific R. Co. v. Thomas*, 19 Kan. 256, is relied on. The position would be correct, and the authority applicable, if the alleged employment had been made for the treatment of injured employees only, but the greater part of the claim was for the treatment of passengers. In the case cited it was held that the division superintendent will be presumed, in the absence of anything to the contrary, to have authority to employ a physician and surgeon to attend an *employee* who has been injured while in the service of the company; and the case of *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458, which is also cited, goes no further. In none of the cases to which we are referred is it held that there is any implied authority in the division or general superintendent to furnish entertainment for, or to employ physicians to attend upon, passengers who have become sick or have been injured without the fault of the company. There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service; but the grounds upon which the authority of the superintendent to make such

contracts is inferred, is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. This risk is incurred by them while they are devoting their energies and labor to promote the interest of the company, and they are generally dependent upon the daily labor thus given for the support of themselves and families. Again, they are skilled in the particular branch of the service in which they are engaged, and their injury, to some extent, interferes with the business of the company, and retards the operation of the road. The company is therefore interested in the speedy cure of employes who have been disabled, and in their early resumption of the duties for which they have been specially trained. *Toledo, W. & W. Ry. Co. v. Rodrigues*, 47 Ill. 188; *Same v. Prince*, 50 Ill. 26. These considerations are wanting in the case of passengers who have been injured by unavoidable accident.

So far as this case is concerned, we must treat and dispose of it upon the theory that the derailment of the train was purely accidental. During the trial the defendant company offered to prove that the train was thrown off the track and wrecked, and the injuries to the passengers and employes were inflicted, by a tornado of wind which was so violent and sudden that it was absolutely impossible for the company, in the exercise of the greatest possible care, to resist or withstand it, and therefore that it was not the fault of the defendant that the train was derailed. This testimony was erroneously excluded by the court, and there was no other given concerning the cause of the accident. We must therefore assume that the injury of the passengers resulted from unavoidable accident, and not from any negligence or fault of the company. Probably there are but few instances of injury to passengers riding upon railroad trains where negligence or fault cannot be traced to the railroad company; but, in cases where there is no such negligence, no responsibility can attach to the company, and no recovery can be had for the injuries sustained. It does not insure the lives or health of those who take passage upon its trains. The most that can be required is that it shall use the highest care in the conveyance of the passenger to his destination. There is no more obligation resting upon the company to provide medical care and treatment for passengers unavoidably injured than for passengers who become sick during the journey over the road. In either case the full measure of the duty of the company is to carry the passenger, in the condition in which he may be found, to his destination. Beyond this the company has no interest in the passenger, and therefore has no such concern for his health and soundness that it has in its employes who may be injured while in its service. To furnish medical care and treatment for passengers in such cases would be a mere gratuity, and the funds of the corporation cannot be thus dispensed by the division superintendent without authority from the board of directors.

In *Cox v. Midland Counties Ry. Co.*, 3 Welsby, H. & G. 268, the station master of the railway company at Birmingham, who acted there as chief officer of the passenger and other departments, employed a surgeon to perform a surgical operation upon a passenger injured by a train of the railway company, and the company contested its liability for the service on the ground that its servants had no authority to bind them by contracts of that description, and the court held that there was no liability against the company therefor, because the power to enter into the contracts was not incident either to the employment of the station master or of the superintendent of the road.

Perhaps it is true that in certain emergencies the superintendents of railroads are authorized to provide medical and surgical care for injured passengers, and to bind the railroad companies for the payment of such services, and it is probably well that such provision should be made; but in those cases it will not be difficult to show the authorization, or a recognized custom or usage, of the company to furnish medical attendance to passengers injured by inevitable accident. In the absence of testimony of express authority from the company, or of a custom or usage from which authority might be implied, the company cannot be bound by such contracts made by the superintendent or his subordinates. If the injury to the passengers resulted from the negligence of the carrier, other considerations would enter into the case which might warrant the implication of authority in the superintendent or some general agent of the company to provide medical attendance and entertainment for them; but, whatever might be the rule in that case, we are of the opinion that there is no such presumption of authority in the division superintendent where the passengers are injured through no fault of the company.

It necessarily follows that there was error in the charge of the court, for which a new trial must be given; and, as the other questions presented by the plaintiff in error may not again arise, it becomes unnecessary to notice them here. The judgment of the district court will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

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(35 Kan. 304)

#### DOLAN v. VAN DEMARK.

Filed May 7, 1886.

##### 1. PLEDGE AND COLLATERAL SECURITY—AUTHORITY OF COLLECTION AGENT.

An attorney at law and banker, having claims in his hands for collection, will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security, and in his own name, a promissory note secured by a chattel mortgage.

##### 2. CHATTEL MORTGAGE—VALIDITY.

Where a mortgagee of chattels takes possession of the same under the terms of the mortgage, and with the consent of the mortgagor, the mortgage will be held valid, although it may never have been filed in the office of the register of deeds, and although the description of the property in the mortgage may be

slightly defective: and *he'd*, in the present case, that there was sufficient evidence to sustain the finding made by the trial court that the mortgagee took the actual possession of the mortgaged property under the mortgage.

3. SAME—FRAUD ON CREDITORS.

While, generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud; or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as a security for such debt, and whether such creditor has notice or not of the prior fraudulent sale.

4. SAME—RIGHT OF MORTGAGEE—REPLEVIN—DAMAGES.

In an action of replevin, brought by a mortgagee of chattels, where the property remains in the hands of the defendant, and is sold by the defendant for more than the plaintiff's claim, with interest, and judgment is rendered in favor of the plaintiff, but only for his damages, and not for a return of the property, *held*, that he may recover as his damages the amount of his claim, with interest, although the petition was only an ordinary petition in replevin.

Error from Washington county.

*J. W. Chadwick*, for plaintiff in error.

*J. W. Rector*, for defendant in error.

VALENTINE, J. This was an action of replevin, brought by C. W. Van Demark against Thomas M. Dolan, to recover certain goods and merchandise. The action was tried by the court, without a jury, and judgment was rendered in favor of the plaintiff and against the defendant, and the defendant, as plaintiff in error, brings the case to this court. The facts of the case seem to be substantially as follows: On March 19, 1883, Henry H. Bradley owned the property in controversy, which, with other goods and merchandise, constituted his stock in trade as a merchant at Brantford, Washington county, Kansas. On that day he sold all the foregoing goods and merchandise to George Brabb, but this sale was made with the intention of hindering, delaying, and defrauding his creditors, and was therefore void as against such creditors. On March 28th, Thomas M. Dolan, who was then the sheriff of Washington county, levied an attachment upon a small portion of the goods. That levy is admitted to be valid, and really has nothing to do with this case. Afterwards, but on the same day, Van Demark, who was an attorney at law and banker at Clyde, Cloud county, Kansas, and who held four separate claims of four different creditors of Bradley, went to Brantford, and to Bradley, and demanded payment of such claims, but Bradley stated that he could not pay the same, but agreed to and did indorse and deliver to Van Demark, as collateral security therefor, a promissory note for \$2,000, dated March 19, 1883, given by Brabb to Bradley as part consideration for the goods sold by Bradley to Brabb, and Brabb, with the consent of Bradley, and in his presence, gave a chattle mortgage on the goods to secure the promissory note. Neither this chattel mortgage, nor a copy thereof, has ever been filed in the office of the reg-

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ister of deeds. Van Demark at the time had knowledge of the fraudulent character of the sale of the goods from Bradley to Brabb. Van Demark claims that he immediately took possession of the goods, with the consent of Bradley and Brabb, with the knowledge of Dolan, and without objection from any one; but Dolan claims that Van Demark never did take or have the possession of the goods. The question of Van Demark's possession is the principal disputed question of fact in the case. Afterwards, but on the same day, a constable levied an attachment on a portion of the goods; but whether that levy is valid or not is immaterial in this case. Afterwards, and on the same day, the sheriff levied three other attachments upon the remaining goods, the property in controversy in this case, and took possession of the same; and afterwards, and on three other days, levied four other attachments upon the same goods. Afterwards, and on May 4, 1883, Van Demark commenced this action for the recovery of the goods. On the trial it appeared that the sheriff had sold the goods for the sum of \$3,089, which was admitted to be their fair value. The court also found that the claims held by Van Demark, with interest, amounted to \$1,424.15, and for this amount rendered judgment in favor of Van Demark and against Dolan.

Dolan, the plaintiff in error, defendant below, sets forth nine assignments of error. We shall not discuss them separately, nor any of them in detail, except the principal ones; but all must be overruled.

The plaintiff, Van Demark, was an attorney at law and banker, and held the aforesaid claims against Bradley for collection, and by virtue of his authority as collecting agent. We think that, presumptively, he had a right to do whatever was best for his clients or customers to secure their collection. *Ryan v. Tudor*, 31 Kan. 366; S. C. 2 Pac. Rep. 797; 1 Wait. Act. & Def. 221 *et seq.*, and cases there cited. And what he did for his clients or customers was in all probability the very best thing that could have been done for them, and was in fact necessary. But whether it was best, and necessary or not, is not a question for third parties to raise. As against Dolan and the persons whom he represents, we think that Van Demark, as the agent of the owners of the claims, had a right to do all that he has done in the present case.

It is claimed, however, by the plaintiff in error, defendant below, that the chattel mortgage is void for the reason that it was never filed in the office of the register of deeds, and also for uncertainty in the description of the mortgaged property. The description was probably sufficient; but even if slightly defective, still neither this objection, nor the one that the chattel mortgage had never been filed, amounts to anything, if Van Demark really and in fact obtained the actual possession of the property before the attachments were levied under which the defendant, Dolan, took final possession of the property, (*Cameron v. Marvin*, 26 Kan. 612, 625, *et seq.*, and cases there cited;

Jones, Chat. Mortg. § 178; Herman, Chat. Mortg. § 38;) and the court below specifically found that Van Demark did so take and have the possession of the property.

It is claimed, however, that this finding is erroneous. This finding, however, is one of fact, founded upon the evidence, and the evidence was all in parol; and if there was sufficient evidence from which the court could have made the finding, the finding must be sustained. Now, we think there was such evidence. Van Demark testified that he took possession of the property, and that whatever he did with reference thereto was done with the consent of Bradley and Brabb, and with the knowledge of the defendant, Dolan, and without any objection from any person. They were all present in the building where the goods were kept, and Van Demark announced that he took the possession of the goods, and turned the key in the front door, and claimed to have the possession thereof. He did not however, remove the goods, nor did he have time to remove them before the defendant, Dolan, levied the attachments upon them, and took the possession thereof; nor did he obtain the keys to the building. The keys at the time were in the possession of Bradley, who finally delivered them to Dolan after he took the possession of the goods under the attachments. We think the evidence is sufficient to sustain the finding of the court below; or, at least, we cannot say that the evidence is not sufficient to sustain such finding. The mortgagee in the present case had a right to take the possession of the property whenever he deemed himself insecure, and undoubtedly there were ample grounds to authorize an honest belief of insecurity. Besides, Brabb and Bradley were willing that he should take the possession of the property.

The fact that the mortgage was executed by Brabb instead of by Bradley, after the goods had been fraudulently sold by Bradley to Brabb, and the fact that Van Demark had notice of the fraudulent intentions of Brabb and Bradley at the time of the sale, cannot render the mortgage void or voidable. While, generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee; yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment, or partial payment, of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale. *Butler v. White*, 25 Minn. 432; *Boyd v. Brown*, 17 Pick. 453; *Murphy v. Moore*, 23 Hun, 95; *Stark v. Ward*, 3 Pa. St. 328; *Webb v. Brown*, 3 Ohio St.

246; Bump, Fraud. Conv. (3d Ed.) 499, 500. The fraudulent vendee may lawfully dispose of the property in any manner in which the fraudulent vendor himself might have disposed of the property if the fraudulent sale had not occurred.

This was an action of replevin. The plaintiff's interest in the property was the amount of the claims which he held against Bradley, with interest; and it was not error for the court below to render judgment in favor of the plaintiff, and against the defendant, for the amount of such claims, with interest. No judgment was rendered for a return of the property, and the amount of the proceeds of the sale of the property was more than enough to satisfy said claims, with interest. The cases of *Green v. Dunn*, 5 Kan. 254, and *Shepard v. Pratt*, 16 Kan. 209, cited by counsel for plaintiff in error, have no application to this case. The plaintiff in error, defendant below, claims, however, that the aggregate amount of the claims, with interest, is only \$1,415.60, or \$8.55 less than the amount for which the court below rendered judgment. This claim, we think, is correct, and the judgment of the court below will therefore be modified accordingly. In all other respects the judgment of the court below will be affirmed. (All the justices concurring.)

(35 Kan. 271)

#### STATE v. WHISNER.

Filed May 7, 1886.

##### 1. INTOXICATING LIQUORS—INFORMATION—CONVICTION.

Where a county attorney, acting by virtue of the provisions of section 8, c. 149, Sess. Laws 1885, commonly called the "Prohibitory Liquor Law," examines various witnesses, who give their testimony before him, which is reduced to writing and sworn to by them, and filed with the information charging the defendant with violations of said chapter 149; and the information so filed is verified by the county attorney on information and belief only; and the names of the witnesses so examined are indorsed upon the information; *held*, that the defendant cannot be convicted of any violations of said act not therein referred to or set forth; and, *further held*, that in this case the information, and the sworn statements filed with it, disclose with great particularity the nature and cause of the accusation made against the defendant.

##### 2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The phrase "due process of law" means law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights.

##### 3. INTOXICATING LIQUORS—PROSECUTION—DUE PROCESS OF LAW.

Where a defendant is charged in an information filed against him in the district court with violations of the prohibitory liquor law of the state; and there is filed with the information the sworn statements of several witnesses, whose names are indorsed upon the information, tending to describe and set forth with greater certainty and precision the offenses charged in the information; and the defendant is allowed to appear in the court and defend by counsel, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf; and is given a speedy, public trial, by an impartial jury of the county in which the offenses are alleged to have been committed,—the proceeding against him is clearly by "due process of law."

##### 4. SAME—SWORN STATEMENTS OF WITNESSES FILED WITH INFORMATION.

Where the county attorney files with the information the sworn statements of witnesses, disclosing the fact that the defendant has committed offenses

against the provisions of the prohibitory liquor law, the defendant, upon the trial, has no right to complain that the witnesses making said statements were required to appear by subpoena before the county attorney and give their testimony. As to such matter, the defendant stands before the court as if the witnesses had voluntarily appeared and made their statements before the county attorney concerning their knowledge of the offenses he has committed against the provisions of said act.

5. **SAME—VERIFICATION OF AFFIDAVIT ON INFORMATION AND BELIEF.**

Where the affidavit annexed to an information charging the defendant with violations of the prohibitory liquor law is verified by the county attorney "to the best of his information and belief," and the sworn statements of witnesses are filed by the county attorney with the information, disclosing the fact that offenses have been committed by the defendant against the provisions of said act as charged in the information, *held*, that the verification sufficiently complies with the requirement of the statute.

6. **JURY—SELECTION—SEVERAL JURORS ON PANEL NOT ELIGIBLE.**

Where 26 persons are summoned to appear as the regular panel of petit jurors, and it is affirmatively shown on the part of the defendant on trial for a misdemeanor that two or three of the panel are not eligible to be returned on the jury-list, *held*, that the court has ample power to purge the jury without sustaining a challenge to the array; and *held, further*, that in such a case there has not been such a palpable disregard of the statute in selecting and drawing the regular panel of jurors as to require a challenge to the array to be sustained. *Railroad Co. v. Davis*, 34 Kan. 199; S. C. 8 Pac. Rep. 146, 580.

7. **CONSTITUTIONAL LAW—STATUTES—DEPOSIT OF APPROVED BILLS IN OFFICE OF SECRETARY OF STATE.**

The governor of the state is required by the statute to cause all bills or acts which have become laws by his approval, to be deposited in the office of the secretary of state without delay. Section 5, art. 1, c. 102, Comp. Laws 1879.

8. **SAME—DUTY OF GOVERNOR TO RETURN APPROVED BILL TO LEGISLATURE.**

There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill or act after it has received his approval and signature; and if the governor reports to the house of representatives his approval of a bill, it is simply a matter of courtesy only.

9. **SAME—WHEN ACT BECOMES LAW.**

After an act of the legislature has, in a regular and constitutional mode, passed both branches thereof, and has been properly signed by the proper officers of both houses, and has been regularly presented to the governor for his approval; and he has approved and signed the same without any mistake, inadvertence, or fraud; and thereafter has voluntarily deposited it with the secretary of state, as a law of the state,—it has passed beyond his control. Its *status* as a law has then become fixed and unalterable, so far as he is concerned, and any subsequent message by him to the house of representatives, notifying that body of his approval of the act, but setting forth his objections to certain provisions of the act, and giving his construction thereof, does not qualify or otherwise affect the act, or the validity of his approval.

**Appeal from Linn county.**

On July 15, 1885, the county attorney of Linn county filed the following information against Robert Whisner:

**"IN THE LINN COUNTY DISTRICT COURT—CRIMINAL ACTION. (No. 2,707.)**

*"The State of Kansas, Plaintiff, v. Robert Whisner, Defendant.*

"Whereas, upon a certain inquiry by and before me lately instituted and carried on at the city of La Cygne, in said Linn county, in the state of Kansas, into and concerning certain violations of an act of the legislature of the state of Kansas entitled 'An act amendatory and supplemental to chapter 128 of the Session Laws of 1881, being an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," approved March 7, 1885, and of the act to which said act is amendatory and supplemental, to me therefore duly alleged

and notified, the testimony of certain witnesses, to-wit, John L. Beckman, John R. Gaines, Gala J. Goss, William L. Michaels, Elmer E. Deel, then and there attending, appearing, and deposing before me, in obedience to my certain subpoena so commanding, theretofore duly issued and served, each of said witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and true answer make to all questions which by me might be propounded touching any violations of the provisions of said acts, or of either of them, and which testimony was then and there reduced to writing, and signed by said witnesses respectively, and is now filed herewith, did and does disclose that one Robert Whisner had committed, at said Linn county, in the state of Kansas, the several certain offenses hereinafter specifically and formally charged as the same are hereinafter charged; and did have and has in his possession, at the place hereinafter charged and described, the property hereinafter described; and then and there kept and used, and keeps and uses, the same for the unlawful purposes hereinafter charged: Now, therefore, I, Selwyn Douglas, county attorney of Linn county, in the state of Kansas, in the name and by authority of the state of Kansas, come now here, and give the court to understand and be informed that Robert Whisner, at the county of Linn, in the state of Kansas, on the first day of May, A. D. 1885, without having procured from the probate judge of said county any permit to sell intoxicating liquors, did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors.

"[The second, third, fourth, fifth, sixth, and seventh counts are omitted, as they are substantially in the form of the first count, excepting the offenses therein charged are alleged to have been committed on May 30, 1885, on June 13, 1885, on June 15, 1885, on June 17, 1885, and on June 22, 1885, and excepting that the second and following counts recited that the sale was other than the one last charged.]

"Whereof, I, Selwyn Douglas, county attorney as aforesaid, in the name and by the authority of the state of Kansas, do pray that a warrant may issue for the arrest of the said Robert Whisner; and that such other and further proceedings may be had as in such cases provided by law.

"SELWYN DOUGLAS, County Attorney of Linn County, Kansas."

"*State of Kansas, Linn County—ss.*: Selwyn Douglas, county attorney of said Linn county, being by me first duly sworn, deposes and says that the foregoing information subscribed by him is true according to the best of his information and belief; and he further says that no permit has ever been issued to said defendant, Robert Whisner, by the probate judge of said county to sell intoxicating liquors.

SELWYN DOUGLAS.

"Subscribed and sworn to before me on this fifteenth day of July, A. D. 1885.

[Seal.] "W. A. C. KERMAN, Clerk District Court, Linn Co., Kansas."

The testimony of the following witnesses, indorsed on the information, to-wit, John Beckman, John Gaines, J. G. Goss, William Michaels, and Elmer Deel, was reduced to writing, and filed with the information. On said fifteenth day of July a warrant was issued for the arrest of the defendant, and said defendant, after having been taken into custody, entered into a recognizance for \$500 for his appearance at the next term of the court. On July 22, 1885, the defendant made a motion to discharge the recognizance for various reasons; among others, that the information was not verified according to law

Trial had at the November term of court for 1885. Before proceeding to trial, the defendant interposed a challenge to the array of the regular panel of jurors, on the ground that the jury had been illegally impaneled. After the hearing of the evidence, the court overruled the challenge. The defendant also objected to the introduction of any testimony, which objection was overruled. Thereupon, the defendant moved the court to require the state to elect upon which of the several counts in the information it would rely. The court granted the motion, and the state elected to proceed upon the first, second, third, and seventh counts in the information, and a *nolle prosequi* was entered as to the fourth and sixth counts. The jury returned a verdict of guilty against the defendant, as charged in the information, upon the first, second, and seventh counts thereof, and not guilty as to the third and fifth counts. On November 21, 1885, the defendant filed a motion for a new trial, which was overruled. On the same day the defendant filed a motion in arrest of judgment, which was overruled, excepting as to the seventh count, and the court refused to sentence the defendant thereon; but thereafter sentenced the defendant upon the first count to pay a fine of \$250, and to be imprisoned in the county jail for the period of 60 days; and upon the second count to pay a fine of \$250, and to be imprisoned in the county jail for the period of 60 days; and that he be adjudged to pay all the costs. The defendant excepted to all the rulings of the court, and brings the case here on appeal.

*S. B. Bradford*, Atty. Gen., and *Selwyn Douglas*, for appellee.

*J. D. Snoddy* and *W. R. Biddle*, for appellant.

HORTON, C. J. The defendant was convicted upon two separate counts of an information, charging him with violations of the provisions of the prohibitory liquor law. He was sentenced to pay fines amounting in all to \$500, and to terms of imprisonment aggregating four months in the county jail of Linn county. From the judgment he appeals. It is urged that the information is insufficient, and that the proceedings against the defendant were not by due course of law. In support thereof it is said that the information did not give to the defendant the nature and cause of the accusation against him, and that the proceeding against him was not by the ordinary course established at the common law. Neither of these points is well taken.

In prosecutions of this character it is not necessary to state the kind of liquor sold, or the name of the person to whom sold, for the statute expressly and specifically provides that these things need not be stated. Section 14, c. 149, Sess. Laws 1885; *State v. Schweiter*, 27 Kan. 499; *State v. Sterns*, 28 Kan. 154; *State v. Olferman*, 29 Kan. 502; *State v. Shackle*, Id. 341; *State v. Brooks*, 33 Kan. 708; S. C. 7 Pac. Rep. 591. In this case, however, the defendant had no reason to complain of being ignorant as to the offenses he was called upon to defend. The testimony of the principal witnesses as to sales

of intoxicating liquors made by him was reduced to writing, and filed with the information. Therefore, before the trial began, he was notified that John Beckman, whose name was indorsed upon the information as a witness, had testified that he had frequently drank whisky and beer in his saloon at different times since March 10, 1885; and that about the first of May, 1885, John Gaines treated him in the saloon to a glass of whisky. He was also notified by the written testimony that John Gaines, whose name was upon the information, had testified that during the spring and summer of 1885 the defendant was keeping a billiard saloon in La Cygne, and that about May 1, 1885, he bought of him, in his saloon, two glasses of whisky, which he poured out; and that about June 15, 1885, he bought of him, in the same saloon, a drink of whisky and cider mixed together, and at the same time saw other parties get and drink the same kind of mixture. Other witnesses, whose names were upon the information, had also testified to specific sales of intoxicating liquors made by the defendant in his saloon in 1885, and before the filing of the information, and also the kind of intoxicating liquors sold by him at said times. Of course, the defendant had the right to suppose that these witnesses would testify upon the trial to the same facts set forth in the testimony filed with the information. Therefore he was given fair notice of the offenses charged against him; of the kind of intoxicating liquors sold by him; and when he sold the same, and to whom he sold the same. In this case the letter and spirit of section 10 of the bill of rights were complied with, as the defendant was informed of the nature and the cause of the accusation against him with great particularity.

An attempt is made to question the constitutionality of section 8 of said chapter 149, giving county attorneys power to subpoena and examine witnesses concerning violations of that act. From the record, however, this question is not before us for decision. None of the witnesses who were subpoenaed and examined before the county attorney of Linn county on July 13, 1885, concerning the violations of the provisions of the prohibitory liquor law by the defendant, are here complaining, and the defendant has no right to complain for them. He stands before the court in reference to such matter as if all the parties to the statements filed with the information had voluntarily appeared before the county attorney, and had made before him, at their own instance, the statements. The county attorney clearly had the right, for the benefit of the defendant, to file with his information a bill of particulars, or any sworn statements, showing what specific offenses he intended to charge, when he verified the information. All of this enabled the defendant to prepare his defense, and, after such statements or evidence had been filed with the information, the defendant could not be convicted of any offense not therein referred to or set forth. *State v. Brooks, supra*; *State v. Clark*, 34 Kan. 289; S. C. 8 Pac. Rep. 528.

It has already been decided by the supreme court of the United States, in *Foster v. Kansas*, 112 U. S. 201, S. C. 5 Sup. Ct. Rep. 8, that the prohibitory liquor law is not repugnant to the constitution of the United States; neither is it in conflict with any of the provisions of the constitution of this state, (*In re Prohibitory Amendment*, 24 Kan. 700; *Intoxicating Liquor Cases*, 25 Kan. 751; *State v. Schweiter*, *supra*; *State v. Foster*, 32 Kan. 14, 765; S. C. 3 Pac. Rep. 534;) and we can perceive no fundamental rights which that system of jurisprudence, of which ours is derivative, has in any way been disregarded. The words "due process of law" do not mean and have not the effect of limiting the powers of the state to prosecutions for crime by indictment; "but these words do mean law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights." *Hurtado v. People*, 110 U. S. 516; S. C. 4 Sup. Ct. Rep. 111, 292; *Walker v. Sauvinet*, 92 U. S. 90-93. The law authorizing the filing of informations in such a case as this is not in conflict with our constitution, or the constitution of the United States. *State v. Barnett*, 3 Kan. 250; *Cooley*, Const. Lim. (5th Ed.) 376; *Kallock v. Superior Court*, 56 Cal. 229; *Ex parte Wilson*, 114 U. S. 417; S. C. 5 Sup. Ct. Rep. 935.

A sufficient information was filed against the defendant. With the information was filed the sworn statements of the important witnesses, whose names were indorsed thereon. Thereby the defendant was fully apprised of the nature of the charges against him, so that he might know what he was to answer. The proceeding against him was upon inquiry. He was heard before he was condemned, and no judgment was rendered until after trial. Therefore there is no force whatever in the assertion "that the proceeding was not by due process of law."

Section 9 of said chapter 149 provides that when a county attorney files a complaint or information, with a statement of any witness, that intoxicating liquors are being unlawfully sold, the information may be verified by the county attorney upon information and belief. Section 67a of the Criminal Code (Comp. Laws 1879) reads: "When an information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief." It is insisted that, as the verification by the county attorney to the information says the same "is true according to the best of his information and belief," it does not comply with the requirement of the statute, and therefore the information is not verified. We think the verification a sufficient compliance with the statute. A person who makes such a verification imports that he has information, and is entitled to entertain the belief he expresses, and when he swears "to the best of his information and belief," he swears that he has information and belief. *Roe v. Bradshaw*, L. R. 1 Exch. 106.

Upon the trial the defendant interposed a challenge to the array of the regular panel of the jurors, on the ground that the jury had not been selected from the list of tax-payers for each township for the

previous year, 1884, according to law. The challenge was overruled, and we think rightly. Of the 26 persons summoned to appear, 2, Faber and Coffin, seemed to have been clearly ineligible. These were discharged by the court. Another juror, G. W. Platt, was a resident of Paris township when the list of jurors was returned, and was not on the assessment roll of that township. At the time of the trial he had lived in Paris township only one year, but had lived in Lincoln township, in Linn county, over 16 years, and was on the assessment roll of Lincoln township in 1884. The neglect or refusal of officers to comply with the statute in the listing and selection of jurors must be affirmatively shown; and as, in this case, only three persons were upon the panel drawn as jurors who were not eligible to be returned on the jury-list, we do not think there was such a palpable disregard of the statute as to require the challenge to the array to have been sustained. *Railroad Co. v. Davis*, 34 Kan. 199; S. C. 8 Pac. Rep. 146, 530. In the case of *State v. Jenkins*, 32 Kan. 477, S. C. 4 Pac. Rep. 809, the jury-list for 1883 was drawn directly from the assessment rolls of 1883, not from the preceding year, 1882, at all.

Finally, it is claimed that said chapter 149 is not a law of the state. This, upon the alleged ground that it has never received the approval of the governor; that his objections thereto were never considered; and that the bill was never passed by a vote of two-thirds of each house, notwithstanding such objections. The facts are these: The act in question, known as "House Bill No. 367," entitled "An act to prohibit the manufacture and sale of intoxicating liquors," etc., having, in the regular and constitutional mode passed both houses of the legislature, and having been properly signed by the proper officers of both houses, was, on March 7, 1885, regularly presented to the governor for his approval. On that day he approved and signed the same, and deposited it, at 10 o'clock of said March 7th, with the secretary of state. Subsequently the governor sent a message to the legislature stating that he had approved House Bill No. 367, but in his message he made objections to several sections of the bill, and attempted to give his own construction of some of the provisions thereof. It is very doubtful whether his interpretation of the act can be sustained. House Journal 1885, pp. 1221, 1222. Upon this state of facts we are clearly of the opinion that the act was properly approved and signed by the governor, and is a law, the constitutional provision bearing on the subject is section 14 of article 2, and is in these words:

"Every bill and joint resolution passed by the house of representatives and senate shall, within two days, thereafter, be signed by the presiding officers, and presented to the governor. If he approve, he shall sign it; but if not, he shall return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same. If, after such reconsideration, two-thirds of the members elected shall agree to pass the bill or resolution, it shall be sent, with the objections, to the senate, by which it shall likewise be reconsidered, and if approved by two-thirds of

all the members elected, it shall become a law. But in all such cases the vote shall be taken by yeas and nays, and entered upon the journal of each house. If any bill shall not be returned within three days (Sundays excepted) after it shall have been presented to the governor, it shall become a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevent its return, in which case it shall not become a law."

This requires the governor, if he does not approve a bill, to return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same. By the provisions of article 4, c. 102, St. 1879, the secretary of state is charged with the safe-keeping of all enrolled bills and resolutions, and also of the laws of the state; and section 5 of article 1 of said chapter 102 specifically directs that the governor "shall cause all acts and joint resolutions which have become laws or taken effect by his approval or otherwise to be deposited in the office of the secretary of state without delay." There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill after it has received his approval and signature, nor is such the practice. As a matter of courtesy, the governor reports, through his private secretary, to the house of representatives his approval of the bill. This and nothing more. The bill in this case was never returned by the governor to the house of representatives, and the message which he transmitted to the house subsequently to his approval was never attached thereto, or made a part thereof. It is not claimed that the governor signed the bill through mistake, inadvertence, or fraud. On the other hand, the facts clearly show that he approved and signed the bill voluntarily, and that he deposited it with the secretary of state as a law of the state. After the bill, therefore, had been approved and signed by him, and he had deposited the same with the secretary, it passed beyond his control. Its *status* then had become fixed and unalterable, so far as he is concerned. His subsequent message was no part of his approval or signature, and whether his objections to the bill, and his construction thereof, after he had approved and deposited the same with the secretary of state, were good or bad, is wholly immaterial. The act in controversy was regularly passed by the legislature, was approved and signed by the governor, was deposited with the secretary of state, and therefore has received all the constitutional sanctions required to give it effect. Arts. 1, 4, c. 102, Comp. Laws 1879; Cooley, Const. Lim. (5th Ed.) 184-188; *People v. Hatch*, 19 Ill. 283; Const. art. 2.

The judgment of the district court must be affirmed.

(All the justices concurring.)

(35 Kan. 232)

SANBORN, an Infant, by his Next Friend, etc., v. ATCHISON, T. & S. F. R. Co.

Filed May 7, 1886.

1. MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYE—BOXING DANGEROUS MACHINERY.

Where, in an action against a railroad company to recover damages for personal injury received by an employe in attempting to oil an iron punch driven by iron cog-wheels, which are six or seven feet from the ground or floor of the machine-shop, the evidence offered shows that it is not usual to box or fence such machinery, and that the machinery is so arranged with a tight and loose pulley that, if a person is going to oil or repair it, he can immediately stop the same by simply throwing the belt onto the loose pulley, *held*, that the failure or negligence to box or fence such cog-wheels is not of itself culpable negligence on the part of the company.<sup>1</sup>

2. SAME—AVOIDING DANGER—PRESUMPTION—YOUTH.

A young man of the age of seventeen years and seven months is presumed to have sufficient capacity to be sensible of danger, and to have the power to avoid it: and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age.

Error from Shawnee county.

On February 17, 1883, Ray Sanborn, an infant, who sues by his next friend, Charlotte Sanborn, commenced his action against the Atchison, Topeka & Santa Fe Railroad Company to recover damages, and in his petition alleged—

"That on the nineteenth day of February, 1881, and prior thereto, the defendant had been, was, and is the owner of and operating a railroad in Shawnee county, Kansas, and certain machinery connected with its said road, situate at the city of Topeka, in said county, among or a part of which it owned and operated a certain 'iron punch' run and operated by steam by said defendant as aforesaid; that plaintiff was, at the time of the grievances hereinafter stated, in the employment of the defendant, and hired to serve said defendant in and about said machinery, and was of tender years, to-wit, seventeen years of age, and ignorant and unskilled in operating and working such machinery, and was on said date in the employment of said defendant, under the charge and direction of H. S. Benton, the foreman, in operating said machinery, as agent, and in the employment of said defendant, and as such authorized and empowered by said defendant to operate said machinery, and to govern and control the men and other employes, including plaintiff, in the employment of said defendant then and there being; that said defendant, by its foreman and employe, well knowing that plaintiff was unskilled and ignorant in operating said machinery, negligently ordered and directed plaintiff to oil and lubricate parts of certain cogs belonging to said machinery employed in operating said iron punch, as aforesaid, which said cogs were, by the negligence and mismanagement of said defendant and its employes, left in an exposed, unprotected, and dangerous condition, and the said plaintiff, in obedience to said order of Benton on said date, using ordinary skill and judgment, and without any fault and neglect, while in the act of supplying the cup of said cogs, had his right hand and arm caught by and between said cogs, and then and there crushed, mutilated, and wounded in such a manner as to, and he did, suffer amputation of said arm below the elbow, and which said accident was caused by the negligence and mismanagement of defendant and its employes by not then and there having said cogs boxed up and cov-

<sup>1</sup> See note at end of case.

ered and protected as the same should and could have been, and by not having the said machinery otherwise properly constructed and adjusted, as defendant was required to do, and in consequence of the said negligence and mismanagement of said defendant, and its agents and employes, plaintiff has become and is rendered a permanent cripple, and in consequence of said injury plaintiff became sick, sore, and disordered, and so remained for a long space of time, to-wit, three months, during all of which time plaintiff suffered and endured great pain, and thereby plaintiff was forced to and did then and there lay out large sums of money, amounting in the whole to two hundred dollars, in and about being ministered to and treated in said sickness, lameness, and disorder, and also thereby plaintiff incurred other and further divers expenses, damages, and injuries, all and total amounting to the great sum of ten thousand dollars, for which plaintiff asks judgment, costs, and other relief as by law in such cases provided.

"H. P. VROOMAN, Attorney for Plaintiff.

"A. B. JETMORE, of Counsel."

On March 13, 1883, the company filed the following answer, omitting court and title:

"Now comes the defendant, and for answer to the petition of plaintiff in the above-entitled cause—

"(1) Denies each and every material allegation therein contained.

"(2) For a second and further defense the defendant says that the injuries, if any, received by said plaintiff were occasioned wholly by his negligence, (gross,) and without fault of the said defendant, its agents, or servants.

"(3) For a third and further defense defendant says that the injuries, if any, received by said plaintiff were occasioned wholly by the negligence of said plaintiff, or his co-employes and fellow-servants, and without fault of the said defendant.

"Wherefore, said defendant prays judgment for costs.

"GEO. R. PECK,

"A. A. HURD,

"Attorneys for Defendant."

On April 4, 1883, the plaintiff moved the court to strike out the second and third paragraphs of the answer of defendant, which motion, upon the hearing thereof, was overruled. Subsequently the plaintiff filed a reply to the second and third paragraphs of the answer.

Trial had at the January term of court for 1884. Upon the conclusion of plaintiff's evidence the defendant interposed a demurrer thereto, which was sustained by the court, and the jury discharged. Plaintiff thereupon filed a motion for a new trial, which, upon hearing, was overruled. Plaintiff excepted to the rulings of the court upon the demurrer to the evidence, and the motion for a new trial, and brings the case here.

*H. P. Vrooman and Jetmore & Son*, for plaintiff in error.

*A. A. Hurd and Robert Dunlap*, for defendant in error.

HORTON, C. J. Action by Ray Sanborn, by next friend, for a personal injury. The petition alleged that Ray Sanborn was ordered by H. S. Benton, the foreman of the boiler-shop of the railroad company at Topeka, to oil and lubricate parts of certain cogs belonging to or

running an iron punch in the shop of the company; that, while in the act of supplying the cup of the cogs with oil, his right hand and arm were caught by and between the cogs, and so mutilated that amputation of the arm below the elbow was necessary; that the accident was caused by the negligence and mismanagement of the company in not having the cogs boxed up and protected as the same should and could have been, and in not having the machine otherwise properly constructed and adjusted as the company was required to do. There is no evidence in the record tending to show that the company was guilty of any negligence in failing to cover or further protect the cogs of the wheels where Sanborn was injured, and no evidence whatever tending to show that the iron punch, and all the machinery connected therewith, was not properly constructed and adjusted.

John M. Stebbins, a witness called by the plaintiff, among other things, testified—

"That he was a boiler-maker by trade, and had worked in that business for forty years; that, at the time of the injury complained of, he was working as a mechanic in the boiler-shop of the railroad company at Topeka, and had been working in the shop for that company about fifteen months; that he knew of the accident very soon afterwards, but did not see it; that there were two punches somewhat similar in the shop,—a heavier punch and a lighter punch; that anybody in the shop who desired could use the small punch; that it was used for general purposes, like punching 1-4 inch, 5-16, 1-2 inch, and 3-8 holes; that the pinion wheel was between five and six feet from the floor; that a shaft driving the punch runs across near the top of the machine; that right in the rear of the pinion wheel is a journal, with a cup on it; that in the top there is a recess where oil is put, and holes to let the oil down to the journal; that to put the oil in you have to put it into the oil-holes; that Sanborn could have oiled the machine from the ground, but by getting on a box that was there, he was able to reach more easily where the oil-box was; that if he had used his left hand there would have been no danger; that he had operated other machines propelled with wheels and cogs like the iron punch; that he had had experience with such machines,—as much as any ordinary man that works in the business; that there was no way in which a person could be caught and injured in the wheel when standing in front of the punch; that a person could oil it just as easy that way; that if a person would get something to stand on in front he would be perfectly safe; that, where the belt runs, a double wheel comes up; that there is a tight and loose pulley with the machine; that when the belt is on the loose pulley it does not run the machine; that by using the 'shifter' a person can put the belt onto the tight or loose pulley; that a person standing in front could stop the machine; that a person standing upon a box for the purpose of oiling on top could reach up, and shove the 'shifter' and stop the machine; that a person could stop the machine to oil it, but this was not the usual method; that before the accident there was no ordinary mode of protecting the machinery."

Joseph Heslett, called by the plaintiff as a witness, testified—

"That he is a machinist, and had been among machines all his life; that he was acquainted with the iron punch where the accident happened, and was acquainted with the construction of machines similar to that one; that he was in the machine-shop when Sanborn was hurt, but about 400 yards away; that there was no necessity for protecting such machinery; that when such machinery is down on the floor, or working on the floor, it is usual to protect

it, but when it is five or six feet from the ground it is not protected; that it is not usual or customary to fence or box machinery that is six or seven feet from the ground; that he put the machine up, and that there is a 'shifter,' and a tight and loose pulley; that if a person was going to oil the machine he would simply throw the belt onto the loose pulley, and the machine would immediately stop; that if any one wanted to repair the machine, that it is the proper method to stop it, and that is what the loose pulley is put there for; that it was the orders, before the accident occurred, to stop the machine to oil it; that he had seen the machine oiled without being stopped, and he had seen the machine stopped for the purpose of being oiled; that the orders were positive to stop the machine when cleaning and oiling."

John Mangán, called as a witness for the plaintiff, testified—

"That he was a boiler-maker, and had worked for twenty-eight years in that business, and in nearly half of the machine-shops of the United States; that he was acquainted with the iron punch and the machinery where the accident occurred; that he was at work for the railroad company in its boiler-shop in Topeka at the time; that prior to the accident there was no ordinary way of protecting such machinery by boxing or fencing to prevent accidents; that he never saw a machine of the kind that injured Sanborn boxed, before the accident."

Sanborn himself testified—

"That he had been at work as a helper in the boiler-shop for a year and ten months; that in the room in which he worked were five machines: two punches, one planer, and two drills; that two of them, the large punch and drill, had been there during all of his service; that the smaller punch, on which he was injured, had been there for about five months; that he knew how the punch was started and stopped; that there were two pulleys, and the belt was shifted from the main pulley into the loose pulley by a shifter; that he saw others do it; that he had seen other men oil the machine as he was doing; that they never got hurt; and that he oiled it in the usual and customary way in which he had seen others oil it."

At the time of the accident Sanborn was in possession of all his faculties and all his senses. The two cog-wheels were about six feet from the ground or floor, and there was nothing to prevent him from seeing that the cogs were not boxed or fenced, and every act that directly contributed to bring about the injury was his own. Of course, he did not intend to get injured. He did not intend to have his hand caught between the cogs where it was crushed; but accidentally his hand got low enough down to be caught, and thus his injury occurred. For this accidental injury he is not entitled to compensation from the company. *Railroad Co. v. Plunkett*, 25 Kan. 188; *Railroad Co. v. Smithson*, 45 Mich. 212; S. C. 7 N. W. Rep. 791; *Sullivan v. Manufacturing Co.*, 113 Mass. 396.

It is said, however, that Benton, the foreman of the defendant's shop, ordered Sanborn to run the punch and to oil the machinery; that he was an infant of tender years, ignorant and uninformed, and therefore this was such negligence that he is entitled to recover damages. As there is no direct allegation in the petition that this caused the injury complained of, it is doubtful whether the question sought to be presented is in the case. If it were a matter for our determi-

nation, we do not think any culpable negligence is shown on the part of the company or its foreman. At the time of the accident, plaintiff was seventeen years and seven months of age. He was not, therefore, in law, an infant of tender years. In this state, if a minor be over 14 years of age, and of sound intellect, he may select his own guardian. In this state, a person over 16 years of age, convicted of any felony or other offense, must suffer the punishment prescribed by the statute, to the same extent as if he had reached majority. We therefore think it may be presumed that a person of the age of Sanborn at the time he was injured has sufficient capacity to be sensible of danger, and to have the power to avoid it, and that this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of that age. *Nagle v. Railroad Co.*, 88 Pa. St. 35. There was no evidence offered tending to show that Sanborn was limited in his mental capacity, or was in any way feeble minded. We fully recognize the doctrine that it may be negligence to set an infant of tender years to work upon a dangerous machine without pointing out its dangers; but, considering the age of the injured party, and the length of time he had worked in the shop of the railroad company before being hurt, the case presented does not come within that rule.

It is unnecessary, in this case, to decide whether the plaintiff had the right to prove that the company, subsequent to the accident, boxed up or inclosed the machinery inflicting the injury. Even if the ruling was erroneous, it was immaterial upon the facts disclosed, and therefore not prejudicial. The most that can be said in that matter is that the company, as a measure of extreme caution, adopted additional safeguards as to such machinery after the unexpected accident had occurred to Sanborn.

The declarations of Benton, the foreman, subsequent to the accident, were not parts of the *res gesta*, and ought not to have been received in evidence. *Railway Co. v. Pointer*, 9 Kan. 620; *Luby v. Railroad Co.*, 17 N. Y. 131; *Sweatland v. Telegraph Co.*, 27 Iowa, 433.

Upon the facts testified to the trial court committed no error in sustaining the demurrer to the evidence. Therefore the judgment of the district court must be affirmed.

(All the justices concurring.)

#### NOTE.

Respecting the liability of master for negligence in the use of defective or dangerous machinery, see *Hurst v. Burnside*, (Or.) 8 Pac. Rep. 888, and note, 895, 896.

Respecting the risks of employment, usual and unusual, assumed by an employe, the negligence of fellow-servants, and the like, see *Kansas Pac. Ry. Co. v. Peavey*, (Kan.) 8 Pac. Rep. 780, and note, 791-797.

(35 Kan. 328)

## STATE v. MILLER.

Filed May 7, 1886.

## 1. HOMICIDE—MURDER IN SECOND DEGREE—JUSTIFICATION.

The defendant, who was charged with murder, admitted that he shot and killed the deceased, but claimed that the act was justifiable. Upon an examination of the evidence given on the trial, it is held to be sufficient to sustain a verdict of murder in the second degree.

## 2. CRIMINAL LAW—TRIAL—EVIDENCE OF DEFENDANT ON PRELIMINARY EXAMINATION.

The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him.<sup>1</sup>

## 3. CONSPIRACY—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

Ordinarily, a conspiracy should be established *prima facie* before the acts and declarations of one co-conspirator can be given in evidence against another; and in this case it is held that the conspiracy was sufficiently shown to warrant the admission in evidence of the acts and declarations of those who were charged with aiding and abetting the defendant in the commission of the offense.

## 4. WITNESS—ADMISSION THAT FORMER TESTIMONY WAS FALSE.

When the witness admits that the testimony which she formerly gave in the case was untrue, and then proceeds to state what she claims is a correct relation of the facts, full inquiry should be allowed with respect to what led her to make the so-called untrue statements, as well as the influences which subsequently caused her to change her testimony; but where such witness has quite fully stated what was said and done by those who were urging her to return to the witness-stand and tell the truth, the refusal of the question as to what she was crying about in their presence is not such an error as will work a reversal of the judgment.

## 5. CRIMINAL LAW—APPEAL—INSTRUCTIONS.

The charge of the court is to be considered as an entirety, and if, when so considered, it correctly states the law, the mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal.

## 6. SAME—FORMER JEOPARDY—NEW TRIAL—MANSLAUGHTER.

When the defendant, charged with murder, was convicted of manslaughter in the fourth degree, and thereupon moved for and obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. *State v. McCord*, 8 Kan. 232.

## 7. SAME—NEW TRIAL—MISCONDUCT OF JUROR.

The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial, when it is not shown that the jurors read any part of what was written in such transcript.

Error from Osborne county.

S. B. Bradford, Atty. Gen., and A. Saxe, for appellee.

Hays & Pitts and Walrond, Mitchell & Heren, for appellant.

JOHNSTON, J. On June 1, 1885, an information was filed in the district court of Osborne county, charging John R. Miller with the murder of Delbert J. Tunison, and also charging that John Cranshaw and Albert Whitaker aided and abetted Miller in the commission of the crime. At the trial had the following September a verdict was

<sup>1</sup> See note at end of case.

returned finding that John R. Miller was guilty of manslaughter in the fourth degree. Upon his motion a new trial was granted, and immediately entered upon. This trial resulted in a conviction of murder in the second degree, from which he appeals to this court. He alleges numerous grounds of error, which we will consider and dispose of in the order of presentation here.

The first point made is that the evidence is not sufficient to sustain the verdict. The defendant acknowledged that on May 19, 1885, he shot and killed Delbert J. Tunison with a gun loaded with bird-shot; but he claims that the killing was justifiable, because the deceased was in the act of stealing certain horses; and also that there were reasonable grounds to believe that he was about to be killed by the deceased, or was in danger of great bodily harm. A statement of some of the leading facts, together with what the testimony offered by the state tended to show, will be enough to make it appear that the verdict was not without support. It appears that on Saturday, May 16, 1885, a difficulty occurred between Tunison and his wife, the exact nature of which is not shown. Her father, Jeremiah Miller, who lived eight miles away, learned of the trouble on Sunday evening, and went at once to the residence of Albert Whitaker, who was jointly charged with the defendant, and who was a near neighbor of the Tunisons, and remained there until Monday forenoon. Before noon of that day, and while Tunison was absent from home, Jeremiah Miller, accompanied by Albert Whitaker, went to Tunison's house, and hitched a pair of horses found there to a wagon, and took Mrs. Tunison and the children to his home, carrying with them some goods and a cow found upon the premises, which property, together with the horses, was claimed by Mrs. Tunison as her individual property. The horses were also claimed by Tunison to be his property. The defendant is a son of Jeremiah Miller, and has made his home with him when not employed elsewhere, as also did his co-defendant, John Cranshaw, who is a son-in-law of Jeremiah Miller. At this time the defendant was at work in Osborne City, which was distant 11 miles from his home, and Cranshaw was engaged in Glen Elder, still further away. On Monday night the defendant and John Cranshaw hired a team at Osborne City, and drove home, where they found Jeremiah Miller and wife, Charles Miller, Albert Whitaker, Mrs. Tunison, and Mrs. Cranshaw. The testimony of the state tended to show that all of the parties anticipated that Tunison would come there during the night to retake the horses claimed by him. It was also testified that on the day previous the defendant visited his home, and heard of the difficulty between Tunison and his wife, and then threatened that he would kill Tunison within a week. There was also testimony that Cranshaw stated to parties in Osborne, from whom he hired the team on Monday night, that they wanted the team to go out home; that Tunison and his wife had separated, and she had gone home; and that Tunison was expected to go there that

night, and if he did there would be trouble, and they were going out to take a hand in it. The parties all remained in the house until about 10 o'clock at night, when a noise was heard at the barn, and defendant and Charles Miller went out there, but found no one. They did not return to the house, but took a position in the barn where the horses stood, and where it was so dark that one object could not be distinguished from another. The defendant was armed with a shotgun, which he says he accidentally found in the barn, and he and Charles Miller remained upon watch in the barn undisturbed until about midnight, when Tunison came into the barn, and, without interference, unloosed and took out a horse, which proved not to be one of those claimed by him, but belonged to Cranshaw. He tied this horse to a post near by, and returned to the barn. While he was out the defendant changed his position in the barn, holding the gun in such manner that it could be readily used; and when Tunison was stepping into the barn the second time the defendant shot him in the neck, when he fell backwards, and expired in a few hours afterwards.

This testimony, together with many circumstances which are not stated, tend strongly to show that the killing was wholly without justification. We do not overlook the fact that there was testimony contradictory to some extent of that which has been stated, nor that testimony was given of threats made by Tunison that he was going after the horses, and would kill any one who interfered with him, and burn and destroy Miller's property, and that these threats were communicated to the defendant and other members of the family. There was also testimony in behalf of the defendant that when Tunison entered the stable door at the time he was shot the defendant ordered him to halt, and that Tunison made a motion with his right hand as if to shoot, at the same time stating: "I have the drop on you, and I will kill you for luck." Under the testimony and theory of the defendant, that Tunison came there to steal horses, and that while attempting to prevent him from committing a felony the deceased drew a revolver, and pointed the same at the defendant in such a way that he had reasonable grounds to believe that his life was in imminent danger, he was justified in shooting the deceased. But the jury were at liberty to disbelieve the testimony of the defendant, and to accept the theory of the state, as they manifestly did do, that Tunison went there, not to steal horses, nor to injure the Millers in person or property, but for the sole purpose of recovering the horses which he claimed as his own, and that the defendant had no reasonable cause to apprehend a design on the part of the deceased to kill or injure him. There is considerable in the testimony of the defendant which tends to weaken his claim, and which correspondingly strengthens the theory of the state. It is claimed by the state that the deceased did not bring a revolver with him, and that the one said to have been found upon his person after he was killed, was

placed there by some member of the Miller family. One improbability in the testimony of the defendant to which our attention has been called, is the statement claimed to have been made by Tunison, just before he was shot, that he had the drop on the defendant, and would kill him, when it appears that it was so dark in the barn where the defendant stood that it was impossible for the deceased to have seen him. The revolver claimed to have been found on his person was not discharged by the deceased, and yet every barrel was empty when it was examined. That the deceased would carry an empty revolver in such a case, or would draw and point it into the darkness, seems somewhat unlikely. Besides, the location of the wound, as well as the course taken by the shot which penetrated his body, would indicate that the deceased was not in such a position as he naturally would have assumed if he had been aiming at or attempting to shoot the defendant. Then, again, it is admitted that they anticipated that he was coming there during the night after the horses, but instead of warning him to desist, or taking any steps to prevent his trespassing upon the premises, they laid in wait, and killed him with but little if any warning. So far as the protection of the property was concerned, it would seem that the killing of the deceased was unnecessary. In addition to the defendant and his brother, who were in the barn, there was Jeremiah Miller, Albert Whitaker, and John Cranshaw, who were at the house, within easy call, and who knew of his coming, and could have assisted in driving him away. If the trespass could have been prevented, or if the threatened danger to the person of the defendant, or to the property which he claimed to be guarding, could have been avoided or prevented by any other reasonable means within his power, the killing of the deceased was unnecessary and inexcusable. But we do not assume, nor is it our province, to weigh the testimony that was given. It was conflicting, and the conclusion of the jury depended very largely upon the credibility of the witnesses produced upon the respective sides. The province of weighing the testimony in such cases belongs exclusively to the jury, and if, upon inspection of all the evidence offered in the case, we find enough to sustain the conclusion of the jury, the verdict will not be disturbed. A careful reading of the record leaves no doubt in our minds that the verdict is warranted by the testimony.

During the trial the state introduced and read in evidence the testimony given by the defendant at the preliminary examination over his objection. The testimony was signed by the defendant, and constituted his written declaration concerning the offense for which he was being tried, and, if properly identified, was admissible in evidence. It is now claimed that it was not identified, but this objection was not made in the court below, where it seems to have been conceded by both parties to have been the evidence which he gave, and cannot be now made.

It is next claimed that the court erred in permitting W. B. Bowen and Samuel Bowen to testify to statements made by John Cranshaw, in the absence of the defendant, regarding the purpose for which the defendant and Cranshaw desired a team to go to Miller's on Monday night, and what they proposed to do when they got there in case Tunison should come after the horses. It will be remembered that Cranshaw was charged with having aided and assisted the defendant in the murder of Tunison. Cranshaw's statements were admitted upon the theory that he was a co-conspirator with the defendant. It is conceded that "ordinarily, when the acts and declarations of one co-conspirator are offered in evidence against the other co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause. But this cannot always be required. It cannot well be required where the proof of a conspiracy depends upon a vast amount of circumstantial evidence, and a vast number of isolated and independent facts," *State v. Winner*, 17 Kan. 298. However, in this case, we are of opinion that, when the testimony objected to was offered, enough had already been shown, and Cranshaw was so far implicated with the defendant as to warrant the court in admitting the testimony. The court fully protected the interests of the defendant in this regard when it instructed the jury that they should disregard the evidence of all statements made by Cranshaw in the absence of the defendant, unless they found from the evidence that before the statements were made Cranshaw had entered into a conspiracy or understanding with the defendant to do some unlawful act to the person of the deceased, and that such statements or preparations were made for the purpose of furthering the object of such conspiracy or understanding.

Several objections, most of which are immaterial, are urged to the rulings of the court upon the testimony given by a witness for the state named Zoe Eaton. This witness was keeping company with the defendant, and had accompanied him to Jeremiah Miller's on the Sunday preceding the killing of Tunison. The county attorney hearing that the witness had stated that the defendant, while in her company on that day, spoke of the difficulty of Tunison with his wife, and at the same time threatened to take his life, called her as a witness for the state. At that time she denied having made such statements, and denied that the defendant had spoken of Tunison, or made any threats against him, in her presence. Before the examination was concluded, however, she returned to the witness stand, and changed her testimony, giving a detailed account of her conversation with the defendant, in which he spoke harshly of the deceased, and threatened to take his life. Considerable testimony, some of which was objected to, was given by her concerning the causes which led her to correct the evidence first given. Each party claimed that she had been tampered with by the other, and, under the circum-

stances, it was competent to examine closely into the influences which led to the contradictory statements in order to determine how much credit should be placed upon the testimony given upon the final trial. On cross-examination she was asked what she was crying about in the probate judge's room. This question was refused. It was in this room where, at the instance of her father and others, she consented to go back upon the witness stand and relate what she now insists is the truth. Having stated that she was crying while there, the question was a proper one. It was probably excluded by the court because the witness had already quite fully stated what was said and done in that room to influence her to correct her testimony. This being so, we think that the defendant was not prejudiced by the refusal of the question asked the witness.

The eighth, ninth, tenth, and eleventh objections are without merit, and the twelfth is that the court would not permit the defendant to prove that the property taken by her and her father from her husband's premises was her separate and individual property. This objection is not tenable. It would have been improper to have entered upon the trial of the right to or ownership of the property in this proceeding. It did appear that the property was claimed in good faith by each of the parties as his or her individual property, and this was the extent to which it was proper to go.

The thirteenth and fourteenth objections are without force, and the fifteenth is a criticism of the instructions given the jury. We have examined them, and find that the defendant has no cause for complaint, except where the court, in speaking of the law of self-defense, states that "before a person can avail himself of the defense that he used a weapon in defense of his life, he must *satisfy* the jury that that defense was necessary," etc. Separating this passage from the general charge, and considering it alone, it might appear to shift the burden of proof respecting one phase of the case upon the defendant, while it is well established that the presumption of innocence is with the defendant, and that the burden of proof rests on the state throughout the trial. But the instructions are to be considered as an entirety, and in another portion of the instructions the court specifically charges the jury that "the burden of establishing the guilt of the defendant rests upon the state, and in no stage of the case does the burden shift upon the defendant to prove his innocence, or to prove that the killing of Tunison was justifiable." The erroneous use of the word "satisfy," of which complaint is made, might possibly have resulted to the prejudice of the defendant if the court had not, in treating upon the same subject, clearly stated the burden to be upon the state, and we therefore think that the jury could not have been misled.

Another instruction complained of is where the court instructed the jury that they might, if the evidence warranted it, find the defendant guilty of murder, either in the first or second degree. Upon the first trial the defendant was found guilty of manslaughter in the fourth

degree. He was awarded a new trial upon his application, and the claim is that he could not afterwards be convicted of a higher degree of crime than manslaughter in the fourth degree. This question has already been determined against the contention of the defendant, where it was decided that the granting of a new trial on the motion of the defendant places him in the same position as if no trial had been had. *State v. McCord*, 8 Kan. 232.

It is finally urged that the motion for a new trial should have been granted upon the grounds of improper conduct of the jury, and improper remarks of the counsel for the state in the argument to the jury. It appears that during the last trial the county attorney made use of the stenographer's transcript of the testimony taken on the first trial, and affidavits were offered that several members of the jury, during a recess of the trial, took this transcript from the table in the court-house, where it was lying, and were apparently reading it, and that the transcript contained testimony not produced before the jury in the final trial. A sufficient answer to this objection is that it was not shown that the members of the jury who handled the transcript read any portion of the evidence. The court finds specially, from all the testimony offered on the motion for a new trial, that it did not appear that the jury read any part of what was written in the transcript.

We find nothing in the argument of counsel, nor in any of the errors assigned, that would warrant a reversal of the judgment, and it will be affirmed.

(All the justices concurring.)

HORTON, C. J. An examination of the record satisfies me that the district court committed some errors upon the trial, but I do not think that these errors affected the result in violation of substantial justice; and section 293 of the Criminal Code provides that on an appeal, in criminal cases, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. Therefore I concur in the affirmance of the judgment of the district court.

VALENTINE, J. I concur in the judgment of affirmance in this case, for, while I think the court below committed a few errors, yet I have no doubt of the correctness of the final result reached. The errors evidently did not affect any of the defendant's substantial rights.

#### NOTE.

The minutes of a justice of the peace taken at a preliminary hearing, and filed in the county court, according to the requirements of statute, (Rev. Laws Vt. §§ 1670-1672,) are not admissible as independent evidence in the subsequent trial in the county court. *State v. Gaffney*, 56 Vt. 451.

The statement made by the accused at the coroner's inquest or preliminary trial, if reduced to writing, whether signed or unsigned, may be used against him on the subsequent trial. *Epps v. State*, (Ind.) 1 N. E. Rep. 491.

(35 Kan. 253)

## ENDOWMENT &amp; BENEVOLENT ASS'N OF KANSAS v. STATE.

Filed May 7, 1886.

## 1. LIFE INSURANCE—MUTUAL COMPANY—VALIDITY OF LAWS 1885, CH. 131.

Chapter 131 of the Laws of 1885 is not unconstitutional or void.

## 2. SAME—CONTRACT, WHEN LIFE INSURANCE.

A contract by an association to pay, at certain stated periods of time, certain sums of money as endowments to living members, or, in case of their death, to pay certain other sums of money as benefits to their beneficiaries, is life insurance, both as to the endowments and the benefits.

Error from Lyon county.

*J. Jay Buck* and *J. T. Bradley*, for plaintiff in error.

*S. B. Bradford*, Atty. Gen., for the State.

VALENTINE, J. This was an action brought by the state of Kansas in the district court of Lyon county, against the Endowment & Benevolent Association of Kansas, to oust it from the exercise of certain alleged corporate powers, and to dissolve the corporation. The case was tried before the court, without a jury, upon an agreed statement of facts, and upon such agreed statement of facts the court rendered judgment in favor of the plaintiff and against the defendant; and the defendant, as plaintiff in error, brings the case to this court for review.

The plaintiff (defendant in error) claims that the defendant (plaintiff in error) is exercising the powers and functions of a mutual life insurance company, in violation of chapter 131 of the Laws of Kansas of 1885. The defendant admits that it has not complied with any of the terms or provisions of said chapter 131, but claims that it is not required to do so; and this, for the following reasons, among others: *First*, the act does not apply to the defendant; *second*, but if it does, then it is unconstitutional and void to that extent.

Does the act apply to the defendant? The defendant claims that it does not, for two reasons: (1) It claims that the act applies only to mutual life insurance associations, and that the defendant is not such an association. (2) It claims that the act can apply only to such mutual life insurance associations as have been or may be organized since the act took effect, and that the defendant's organization dates from January 7, 1885, while the act did not take effect until March 14, 1885.

The whole question as to whether the act applies to the defendant or not we think depends entirely upon the question whether the defendant is engaged in the business of life insurance or not. That it is an incorporated association, doing business on a mutual and co-operative plan, with mutual rights, privileges, and obligations among its members, it admits; but it claims that it is not engaged in any kind of life insurance business. Indeed, it claims that it is not engaged in an insurance business of any kind, and is not an insurance company or association of any kind. It claims that it takes no risks which may with any degree of propriety be called insurance risks;

and that it makes no difference to it, or to any of its members, whether persons joining the association are old or young, in good health or in bad health, or whether they are likely to live long or to die soon; and, indeed, it claims that the association is nothing more than "a loaner of money." On the other hand, the plaintiff claims that the defendant is a mutual life insurance association, and nothing else. In our opinion, if the defendant is not engaged to any extent in the business of mutual life insurance, then the act will not apply to it; but if it is engaged in any such business, then the act will apply. The title to the act reads as follows: "An act providing for the organization and control of mutual life insurance associations in this state;" and, of course, unless the defendant is engaged in the business of "mutual life insurance," within the meaning of this title, the act itself cannot apply to the defendant; but if the defendant is engaged in this kind of business, then we think the act will apply, and not only by the terms of this title, but also by the express provisions of the act itself. It will be seen from an inspection of the body of the act that it was the intention of the legislature that the act should apply to all mutual life insurance associations organized on the assessment plan, with a few exceptions, whether the associations were organized before the act took effect or afterwards. See section 30 of the act.

For the purpose of determining whether the defendant is engaged in the transaction of a mutual life insurance business or not we shall now proceed to consider the nature and character of its organization, and the kind of business which it does in fact transact. The association is a corporation, and was organized on January 7, 1885. The charter is broad enough to authorize it to transact a mutual life insurance business upon the assessment plan, and also upon both an endowment plan and a death or mortuary plan, if it so chooses; but, of course, its charter is not conclusive as to the kind of business which it does in fact transact. But the kind of business which it does in fact transact is as follows: Its general laws makes all white persons, male or female, between the ages of 18 and 55, of good moral character and temperate habits, eligible to become members of the association, and the association receives such persons as members. There are two funds provided for: (1) The expense fund; (2) the endowment or benefit fund. The members are divided into two classes as to the amounts of the endowments or benefits, one class receiving a \$3,000 certificate, the amount thereof to be paid to the member in five equal installments if he or she lives, and, in case of his or her death, as hereafter stated; and the other class receiving a \$5,000 certificate, also to be paid in five equal installments, or otherwise as above mentioned for the \$3,000 certificate, and all these installments are represented by coupons attached to the certificate. The membership fees, annual dues, and assessments are made larger or smaller, to correspond to some extent with the amount of the endowment or

benefit certificate. The members are also classified as to age; those becoming members at an earlier age paying a less amount on assessments than those becoming members at a more advanced age, and the amounts to be received by the members as endowments to become due at more widely separated periods of time.

It is scarcely necessary for us to say anything further with regard to the membership fees or annual dues, or other items of the expense fund, for those items furnish but little proof as to whether the association is an insurance company or not, or whether it does an insurance business or not. That fund is used merely for the purpose of paying the expenses of the association. We shall therefore confine our investigation principally to the manner of creating and using the endowment or benefit fund. This fund is created by assessments upon the members, and may possibly be augmented in some rare instances by interest received on loans made from such fund. These assessments may be made at any time, and are made upon all the members of the association; but not less than 15 nor more than 24 assessments are permitted to be made in any one year. We might take any class of the members for the purpose of illustrating what we wish to say; but, taking the class of youngest members,—those between the ages of 18 and 25 years,—and taking those whose certificates of membership authorize them to participate in the endowment fund to the extent of \$5,000, and the assessment on each member will be \$1.50, and each member will be entitled to receive from the endowment fund, every 10 years from the date of his membership, \$1,000, until he receives the entire sum of \$5,000; that is, five coupons of \$1,000 each are attached to each certificate of membership, and one of such coupons becomes due and is payable by the association to the member every 10 years from the date of membership for the period of 50 years. If the member dies, however, before receiving the entire amount, his beneficiary named in his certificate of membership will be entitled to receive, not the full face value of the remaining coupons, or the full face value of any one of them, but will be entitled to receive the actual value of the then maturing coupon, to be calculated from the date of the issue thereof to the date of death, less such amounts as may possibly have been previously received by the member as a loan on such coupon. In other words, such a member, if he or she lives, will pay into the endowment fund every 10 years from \$225 to \$360, and will be entitled to draw out of such fund, within the same period of time, the sum of \$1,000, and will pay into such fund during the 50 years which his or her certificate of membership runs from \$1,125 to \$1,800, and will be entitled to draw out of the fund the sum of \$5,000. If it be asked how the association can pay these large sums from such assessments, we would answer that it is not a question of law, and we cannot answer it. It would seem to us, however, that it cannot be done. It would seem to us that all possible receipts of money by the association, in-

cluding payments of all kinds made by the members, and all possible interest received from loans, would not be anywhere near sufficient to pay the maturing coupons. And we would further think that if the members of the association entertain even the slightest hope of receiving such wonderful gains upon their investments as the foregoing figures would indicate, there would be but few lapses or forfeitures of memberships to assist in saving the association from insolvency. But there is no probability that every member will live for the period of 50 years from the date of his first becoming a member, or for the period of time during which his certificate of membership is to run; and, if he should die before that time, then what will his beneficiary be entitled to receive? The agreed statement of facts answers this question as follows:

"Upon the death of a member who has complied with the rules of the association, and has paid all lawful charges, assessments, and dues against him on the books of the association, the association settles with his beneficiary by paying to him the actual value of the then maturing coupon, calculating from date of issue to date of death, less any amount already received on said coupon, that being the actual amount earned by said coupon, and no more than that amount."

Is this amount which the beneficiary is to receive more or less than the amount to be paid in by the member? Generally it will be very much more. Take, again, for illustration, those members who became such at an early age, and who hold certificates for \$5,000, and the most that any one of them can ever be assessed for any one year is \$36, while the first maturing coupon will earn during that same year the sum of \$100; for the amount of each coupon attached to his or her certificate of membership is just \$1,000, and the first maturing coupon is payable in 10 years. Hence, if the member die at almost any time after the last half of the first year, and before the first coupon becomes due, his beneficiary will be entitled to receive more than he or she has paid into the endowment fund,—much more, indeed, than the amount of the money which he or she has paid into such fund, with interest, and much more even than all that he or she has paid to the association for all purposes, with interest. If the member dies at any time after the first coupon has become due, substantially the same result will follow. If, for instance, the member dies at the end of 45 years, and if the value of the maturing coupon is to be estimated from the date of issue to the date of death, and this is the agreement, then the beneficiary should receive forty-five fiftieths of the amount of the coupon, or \$900; while the member could not possibly have paid into the beneficiary or endowment fund more than \$360 since the last payment of a coupon, and at that time he or she had drawn out of such fund at least \$3,200 more than he or she had paid in, if, indeed, he or she was able to draw out of such fund all that he or she was entitled to draw. Under such circumstances, can it be supposed that the member has re-

ceived anything as a loan or otherwise on the maturing coupon? And as loans are made, if ever made, upon the security of the maturing coupon, it would seldom, if ever, happen that a deceased member would have received, at the date of his or her death, all that such maturing coupon had earned up to that time; and hence, practically, in every case of the death of a member, the beneficiary would be entitled to receive something, and in almost every instance to receive much more than had been paid in by or for the member over and above the amount that had been received by him or her. But, even if the value of such coupon should be calculated from the date of the payment of the last coupon, then what we have already said in connection with the death of the member during the maturing of the first coupon will apply.

What we have said with respect to the youngest members entering the association, and to the \$5,000 certificates, will apply with about the same force to all the other members, and to both classes of certificates. Persons from 50 to 55 years of age becoming members of the association are assessed, at each assessment, \$5.60, and one of their coupons becomes due every four years, and the last one becomes due at the end of twenty years. Now, a member may die at any time; and if he or she dies, his or her beneficiary would, in almost every instance, receive a larger amount of money than the member had paid into the association over and above what he had received, and in many instances a very much greater amount; and this amount so received by the beneficiary would go, like all benefits paid in cases of insurance, to the beneficiary as his absolute property, and would not belong to the estate of the deceased member, nor be any part of the assets thereof, nor could his or her executor or administrator control it, or use it for any purpose whatever. If this is not insurance, what is it? The counsel for the association claims that the association is a mere "loaner of money." But where will it get the money to loan? It agrees to pay out to its members and their beneficiaries very much more than it can possibly receive. For instance, it assesses its members who enter the association while they are less than 25 years of age not to exceed \$36 a year each, while it agrees to pay them at the rate of \$100 a year each. It assesses its members who enter the association at the most advanced age at which the association will receive members not to exceed \$134.40 a year each, and agrees to pay them at the rate of \$250 a year each. And the first coupons of this last-mentioned class of members become due and are payable in four years after such members join the association. Now, can such an association have money to loan at any time after its coupons begin to fall due? And when any large number of its coupons have fallen due, must it not forever afterwards be hopelessly insolvent? Of course, the association might do a thriving business for four or five years, and until the time when its coupons begin to become due, and perhaps it hopes that from and after that time, and just before any pay-

ments or loans are made on such of the coupons as are due, or will soon become due, there will be such a vast number of forfeitures or lapses of memberships, and such a vast number of accessions of new members, that the association will be saved from the utter insolvency that would otherwise necessarily follow. But this hope of the association would probably prove illusory. Forfeitures and lapses are within the control of the members themselves; and so long as it is profitable for the members to remain in the association there will be but few forfeitures or lapses. It is not at all probable that members will retire from the association only at a time when it is profitable to the association for them to retire. They will probably retire from the association, if they retire at all, only at times when they have just received the full payment of their matured coupons, or loans to the full amount which their maturing coupons have earned, and at times when they have nothing to lose by retiring from the association, but probably much to gain. Besides, no society should be founded upon the theory or hope of forfeitures and lapses. No society should be founded upon the theory that those who have long been members, and have paid large sums of money into the society, shall then be crowded out and deprived of all the benefits for which they have paid their money, and new members taken in to supply their places, and possibly to undergo the same process of payments, forfeitures, lapses, and losses of benefits. We think it is clear that the money paid on the coupons, either to the members themselves while living, and after the coupons have become due, or to their beneficiaries after their death, and on maturing coupons, cannot be called loans. Such payments are merely the payments of money in satisfaction of liabilities.

Also the following language from the charter and the laws of the association tends to show that the association is an insurance company, and does a life insurance business, to-wit:

"CHARTER.

"The objects of the association are (1) to guard its members, to a great extent, against the ills of pecuniary want during life, and especially during the period of infirm old age, and at their death to make provision for their families and friends, which latter is supposed to be the only physical anxiety of dying man."

*"General Laws. Article 4.*

"Section 1. Any applicant who shall make any false statement, conceal or evade any fact, in regard to their personal history or present condition of health, shall forfeit all benefits they may appear to have gained by becoming a member of this association.

"Sec. 2. Each applicant for membership must sign the application furnished by the association, state age and residence, and answer truthfully the questions propounded by the association in his or her application in regard to health and habits; and any false statement in regard to age, habits, or character, or any evasion or deception whatever, will debar such applicant from any of the privileges or benefits of this association.

"Sec. 3. All applicants must be persons of sound health, good moral character, sober, and competent to gain a livelihood."

We suppose that the contracts to pay benefits to the beneficiaries of deceased members are unquestionably insurance; but are not the contracts to pay endowments to living members also insurance? The amount agreed to be paid to living members is much more than they have paid into the association, including interest, and must come, partly at least, if it ever comes, from assessments paid by other members whose memberships have been forfeited and have lapsed; and this amount agreed to be paid to living members is in such a condition that it could not be sold or seized in execution or attached or garnished while it is maturing, nor at any time before it has become absolutely due; and if the member should die at any time while it is maturing, nothing would go to his or her executor or administrator, or become a part of the assets of his or her estate. Said chapter 131, § 9, recognizes such endowments as insurance. So, also, do the decisions of courts and the elementary authorities on insurance. In the case of *Briggs v. McCullough*, 36 Cal. 542, 550, 551, the following language is used:

"The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. \* \* \* The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the mean time, does not divest it of its character of life insurance."

See, also, *Carter v. John Hancock Mut. Life Ins. Co.*, 127 Mass. 153; *Bliss*, Life Ins. § 6; *May*, Ins. § 344b.

We also understand that contracts to pay endowments to the living members of an association, company, or society are generally, at the present time, recognized, by persons having connections with life insurance business, and others, as insurance contracts; and if such is the case, it would seem to follow that the title to chapter 131 is broad enough to permit the legislature to insert in the act, as they did, provisions relating to such endowment contracts, although under the old definitions of life insurance these endowment contracts might not be considered as coming strictly within the business of life insurance. But, taking the clearly-expressed intention of the legislature as found in the act itself, the decisions of the courts relating to endowment insurance, the opinions of authors on life insurance, and the prevailing opinion of people connected with life insurance, and of people in general, we think the contracts in the present case, to pay certain sums of money as endowments to living members, are insurance, as well as the contracts to pay certain other sums of money as benefits to the beneficiaries of deceased members. And, this being our opinion, we think that chapter 131 is not unconstitutional or void, so far as it

has application to this case, for the reason that its title is too narrow, limited, or circumscribed.

But it is claimed, however, that the act is unconstitutional for other reasons than that the title to the act is not broad enough to include contracts for the payment of endowments. It is claimed, for instance, that the act is unconstitutional and void, so far as it applies to the defendant, for the reason that it changes or abrogates some of the provisions of its charter. Now, such legislation is permissible in this state under our constitution. The defendant, in the present case, was organized as a corporation on January 7, 1885, under the general incorporation laws of the state of Kansas; and chapter 131, which took effect March 14, 1885, is also a general law, and the legislature clearly has the right by general law to change, alter, or repeal any portion of the General Laws of Kansas, whether they relate to corporations or not. Section 1, art. 12, of the constitution of Kansas provides as follows: "Section 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed." And, under these provisions of the constitution, the legislature undoubtedly has the right to do all that it has done in the present case. *Greenwood v. Freight Co.*, 105 U. S. 13, and cases there cited.

It is further contended that the act is unconstitutional for still other reasons; but we do not think that any of such contentions can be maintained. *State v. National Ass'n of Farmers' & Mechanics' Aid Ass'n*, 34 Kan. —; S. C. 9 Pac. Rep. 956.

The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

HORTON, C. J. I confess I cannot understand the workings of the Endowment & Benevolent Association, if it is only a "loaner of money," and intends to be fair and honest in all of its representations and dealings. Why there should be so many lapses or forfeitures in the business of merely loaning money in a sound and solvent corporation, as is estimated by its officers, is difficult to conceive. If the theory of its counsel is correct, the association lives upon the misfortunes of its members, rather than upon the safe and successful investment of its funds. If the purpose of the company be interpreted by its charter and by-laws, it is nearer an insurance company than a loan company. A person, to become a member, must be of sound health, good moral character, temperate habits, and competent to gain a livelihood. Every applicant for membership must answer truthfully all questions propounded by the association in his or her application in regard to health and habits, age and character; and any member forfeits all benefits in the association if he or she makes any false statement, conceals or evades any fact in regard to his or her personal history or condition of health. If an

early death is no more disastrous to the corporation than one more remote, why must an applicant, to become a member, be of sound health, and endowed with all the qualities for a long life?

I concur in the judgment rendered, with some doubts, however, whether the business of the association comes strictly within the provisions of chapter 131, Sess. Laws 1885.

## SUPREME COURT OF KANSAS.

(35 Kan. 299)

## WESTBROOK v. MIZE.

Filed May 7, 1886.

## 1. ESTOPPEL—JUDGMENT—JOINT DEFENDANTS.

Where several persons jointly commit an injury, the liability is joint and several, and the party injured may sue all of them in a single action, or he may sue them separately at the same time; but, although several judgments may thus be obtained, there can be but one satisfaction, and the acceptance of payment in full upon the judgment obtained against one of such persons will operate as a bar to the further prosecution of actions for the same injury against any of the others.<sup>1</sup>

## 2. SAME—DAMAGES.

Although several separate suits may be brought for a joint liability, yet, where the injury is an entirety, the damages resulting therefrom cannot be apportioned among the wrong-doers, nor divided into separate demands; and where the injured party sues one of the wrong-doers, and demands only a part of the damages which he suffered by the injury, a recovery and satisfaction therein will operate as a bar to any further claim of damages against the others.

## 3. SAME—SEPARATE SUITS—COSTS.

In such a case, where separate suits are instituted against the wrong-doers, the plaintiff is entitled to the costs which had accrued in all of the cases up to the time when satisfaction is made in any one of them, but the defendants are entitled to recover the costs that may subsequently accrue in the other cases.

Error from Marion county.

*Doster & Bogle*, for plaintiff in error.

*Scott & Lynn* and *J. Ware Butterfield*, for defendant in error.

JOHNSTON, J. This is an action for the conversion of a quantity of hay belonging to the plaintiff. After the plaintiff's reply had been filed, the court, upon motion of the defendant, rendered judgment against the plaintiff upon the pleadings in the cause, and this is the ruling complained of here. The only question for our decision, then, arises upon the interpretation and effect of the pleadings. It was alleged in the petition that on November 14, 1882, the defendant, J. S. Mize, wrongfully carried away and converted to his own use 60 tons of hay belonging to the plaintiff, which was of the value of three dollars per ton. The defendant answered that the hay was seized as the property of one Henry J. Tucker, under an attachment issued in an action brought by C. F. Brandner against the said Tucker, in which action a judgment was rendered in favor of Brandner, and the attached hay was ordered to be sold as the property of Tucker to satisfy the judgment. In pursuance of that order, and the direction of Brandner, the defendant advertised for sale the 60 tons of hay of which he had possession, and on November 14, 1882, sold the same to Brandner; but when the hay came to be delivered to the purchaser on November 14, 1882, there remained but about 13 tons

<sup>1</sup> See note at end of case.

thereof. The balance of it, as was alleged, had been hauled away and used by Westbrook, the plaintiff in this action. As a further defense the defendant alleged that on November 14, 1882, C. E. Westbrook began an action against Brandner to recover for 30 tons of hay of the alleged value of three dollars per ton, claimed by Westbrook to have been wrongfully carried away by Brandner, and which was the same hay in controversy in this action. That cause was tried on March 7, 1883, and resulted in a judgment in favor of Westbrook, and against Brandner, for the sum of \$81 damages, with interest from the fourteenth day of November, 1882, and the costs of suit. That on April 14, 1883, Brandner paid that judgment in full, and on April 17, 1883, the amount thereof was accepted and receipted for by the plaintiff, Westbrook. The plaintiff replied that the hay mentioned in defendant's answer was, at the time of the pretended levy and sale thereof by the defendant, in his capacity as constable, the property of the plaintiff, of which fact he had full knowledge when the levy and sale was made; and he averred that the defendant and C. F. Brandner, who also knew that the hay was the property of the plaintiff, colluded together for the purpose of injuring the plaintiff, and depriving him of his property, and, so colluding together, caused the levy and sale of the hay as the property of Henry J. Tucker. In further reply to the answer of the defendant the plaintiff alleged that the judgment mentioned in his answer against said C. F. Brandner was rendered, "under chapter 113 of the Compiled Laws of 1879, for treble the actual damages sustained by said plaintiff on account of the wrongful act of said Brandner in carrying away from section one, town twenty-two, range four, in Marion county, Kansas, nine tons of hay in controversy in this suit, and no more; the same being only a portion of the hay which said Brandner and said defendant had, as hereinbefore alleged, wrongfully levied upon and sold and converted to their own use, and by reason of said fact was not a payment for the full amount of damages which the said plaintiff sustained by the wrongful and tortious act of the said Brandner and said defendant."

We are of opinion that the acts of the plaintiff, as stated and admitted in the foregoing pleadings, barred the further prosecution of his suit. By his reply it appears that the defendant and C. F. Brandner conspired together to wrongfully deprive the plaintiff of his property. The tortious taking of the 60 tons of hay was the joint action of both Brandner and the defendant. It being a joint wrong, either or both of the parties were liable to the full extent of the injury, as the law holds any one of such joint trespassers responsible for the misconduct of all. The plaintiff was therefore at liberty to sue them jointly, or to bring separate actions against each, but he can only have one satisfaction for such injury. The bringing of a suit against Brandner would not bar the institution of a separate suit against the constable; but if a recovery was had in the case

against Brandner for the joint liability, the satisfaction of that judgment would preclude the further prosecution of the action against the constable. That is the case made by the pleadings. The present action was brought on the twelfth day of March, 1884, and in the reply filed by the plaintiff he admits that on November 19, 1883, he sued Brandner for taking and carrying away a portion of the hay in controversy in this action, and obtained a judgment therein, which has been fully satisfied. That the hay involved in that suit is the same for which a recovery is sought in this action is quite clearly stated. He first charges that the defendant and Brandner wrongfully converted 60 tons of hay by the unlawful levy and sale thereof as the property of Tucker, and then states that the judgment which he recovered against Brandner in the former action was for "nine tons of hay in controversy in this suit,"—"the same being only a portion of the hay which said Brandner and said defendant had, as hereinbefore alleged, wrongfully levied upon and sold and converted to their own use;" and then he follows with the statement that the amount of recovery in that action "was not a payment for the full amount of damages the said plaintiff sustained by the wrongful and tortious act of said Brandner and said defendant." It is thus seen that the wrongful taking charged against Brandner, for which a recovery and satisfaction has been had, is embraced in the joint injury committed by the defendant and Brandner.

It is now claimed by the plaintiff that, as the recovery against Brandner was for but nine tons of the hay, a separate action can be maintained against him for the injury done by his co-trespasser, providing the damage done by one can be ascertained and separated from that committed by the other. The responsibility cannot thus be apportioned. The entire quantity of the hay was levied upon under a single attachment, and sold at a single sale, in pursuance of the alleged conspiracy between Brandner and the defendant. The levy and sale, under the circumstances alleged, constituted a single tortious act, and the injury thus jointly committed is an entirety. It is immaterial who removed and used the hay, or whether nine tons were actually used by Brandner, and the other fifty-one by Mize, because, being a joint trespass, each is responsible for the whole, and a release of one is a release of all. From the pleadings it appears that the injury inflicted, and the claim of damages therefor, constituted a single and entire demand, which the law does not permit to be severed or divided up into several causes of action. If, in the former action, the plaintiff demanded less than he was entitled to, or if he sued for all and recovered less, he will not be permitted, after the payment and acceptance of the amount recovered, to maintain an action against the other trespasser for the balance to which he was entitled, or which he might have demanded in the first instance. *Turner v. Hitchcock*, 20 Iowa, 310; *Cooley, Torts*, 133 *et seq.*, and cases cited.

Nor will it avail the defendant that the former action was brought under chapter 113 of the General Statutes. Under the averments of the plaintiff in the present action, both Brandner and the defendant might have been proceeded against in the action brought under that statute. In that action the plaintiff could have recovered treble the value of the hay taken and carried away, which is all, and more than all, sought to be recovered in this action. It is immaterial which remedy he pursues; he had but a single demand, and can only have a single satisfaction. Either remedy was open to him, and, having elected to pursue the special statutory remedy, the other is not now available.

The assessment of all the costs against the plaintiff was, however, erroneous. The judgment in the first action was not paid until April 14, 1883, and the present suit was begun on March 12, 1883, and the answer therein was filed on April 6, 1883. The plaintiff, as we have seen, had a right to bring and maintain separate suits against each of the wrong-doers at the same time, and therefore had a right to recover all costs in both suits up to the time when satisfaction was made in either one. The plaintiff was therefore entitled to recover the costs which had accrued in this action until the judgment in the first action was fully satisfied, while all costs which subsequently accrued should be assessed against the plaintiff.

The judgment will be so modified, and the costs in this court will be divided.

(All the justices concurring.)

#### NOTE.

When separate actions are brought for a joint trespass, the plaintiff can recover against one or all, and if separate judgments are obtained, he may make his election. *Power v. Baker*, 27 Fed. Rep. 396.

An injured party may sue several joint trespassers separately, and prosecute each suit to final judgment. He cannot, however, have separate executions, but must elect, and the issue of an execution against one discharges the others. *Fleming v. McDonald*, 59 Ind. 278.

In *United Society of Shakers v. Underwood*, 11 Bush, 265, the plaintiff recovered judgment in an action of tort against one who was jointly liable with defendant, which judgment was satisfied in part, and afterwards brought this action for the same cause. It was held that the first judgment, not having been paid in full, was no bar to the suit.

In *Gunther v. Lee*, 45 Md. 60, the plaintiff, in an action against several tort-feasors, executed to one of them a release under seal, acknowledging full satisfaction for the tort, but reserving his claim against the others, and it was held that the release inured to the benefit of all the defendants, and that the reservation was inoperative.

Where several have jointly trespassed on real estate, the receipt of money from one of them will not bar an action against the others, the amount received being less than the damage, and it not being understood to be in full satisfaction. *Ellis v. Essau*, (Wis.) 6 N. W. Rep. 518.

## SUPREME COURT OF OREGON.

(13 Or. 380)

STATE *ex rel.* SHAW v. WARE, County Clerk, etc.

Filed April 26, 1886.

## 1. ELECTIONS—NOTICE OF VACANCIES—MANDAMUS—CITIZEN'S RIGHT TO REMEDY.

That the defendant should discharge correctly the duties of his office, in respect to naming the office of circuit judge in his notices of election for a general election, is a subject-matter in which the relator, as a citizen and voter of the county, has a general interest, and, in the absence of any other vital objection affecting the remedy, that interest is, of itself, sufficient to enable him to maintain *mandamus*.

## 2. COURTS—CIRCUIT COURTS—ELECTION OF JUDGES—UNEXPIRED TERM—CONSTITUTIONAL LAW.

A judge of the circuit court, elected to fill a vacancy caused by death or resignation, is, by the terms of the constitution, (article 7. §§ 3, 4, 7,) and of the statute of 1878, elected only for the remainder of his predecessor's term of office.

WALDO, C. J., dissenting.

*E. B. Watson and George F. Washburn*, for appellant, Joel Ware, County Clerk, etc.

*W. R. Willis and O. F. Paxton*, for the State.

LORD, J. This is a proceeding for a *mandamus*, brought by the state of Oregon upon the relation of William S. Shaw, who is alleged to be a citizen and voter of Lane county, Oregon, to compel the defendant and appellant, as clerk of Lane county, Oregon, to correct his notices of election for the general election to be held in said county on the first Monday in June, 1886, by naming therein the office of circuit judge of the Second judicial district to be filled thereat. Upon the presentation of the petition, an order was made by the judge that an alternative writ of *mandamus* issue, directed to the defendant, commanding him to correct said notices of election by naming the office of circuit judge to be filled at said general election, or show cause why he has not done so. Upon the return-day the defendant returned said writ with his answer annexed thereto, in which he denied all the material allegations in said petition; and, for a further and separate defense, in substance, alleged that at the general election held in the Second judicial district of the state on the first Monday in June, 1880, Hon. JAMES F. WATSON was duly elected judge of said district by the legal voters thereof, and thereafter duly qualified as such judge, and entered upon the discharge of the duties of said office, and continued so to act until about the first day of February, 1882, when he resigned said office; that on or about said last date Hon. JOHN BURNETT was duly appointed and commissioned by the governor of the state as judge of said district, and continued so to act by virtue of the same until the first Monday in July, 1882; that on the first Monday in June, 1882, at a general election held in said district, Hon.

ROBERT S. BEAN was duly elected judge of said district by the legal voters thereof, and thereafter duly qualified as judge of said district, and entered upon the discharge of the duties of said office, and ever since said time has been and now is the duly elected and qualified judge of said district: that he has not died or resigned said office, but is now discharging the duties thereof, and his six-years term of said office will not expire until the first Monday in July, 1888. The defendant further alleges that his reasons for not naming the office of circuit judge for said district in the notices of election to be held in said county on the first Monday in June, 1886, are that there is no circuit judge of said district of the state to be elected at said election. To the separate answer of the defendant the plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense to said writ, or any reason why a peremptory writ should not issue. The court sustained the demurrer, and, the defendant refusing further to plead or answer, it was ordered that a peremptory writ issue, directed to the defendant, commanding him to immediately correct said notices of election by naming therein the office of circuit judge of said district, to be filled at the general election in June, 1886, etc. From this order and judgment the defendant appeals to this court.

Our statute provides that the county clerk shall, at least 40 days before any general election, make out and deliver to the sheriff of his county notices of election, naming the offices to be filled, etc. Code, § 4, p. 566. No objection is raised but what the duty which this section of the statute imposes is ministerial and imperative, and may be enforced by *mandamus*; but it was questioned at the argument whether the relator had such an interest in the matter as would sustain the proceeding. The case presented is for the enforcement, not of a private, but of a public, right. The relator has no special interest as distinct from the public to require the performance of this duty, but he has an interest in having the duty performed in common with other members of the community. Is this sufficient? Upon reason and authority we think it is. Mr. High says:

"As regards the degree of interest upon the part of the relator requisite to make him a proper party on whose information the proceeding may be instituted, a distinction is taken between cases where the extraordinary aid of *mandamus* is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest; and while the authorities are conflicting, yet the decided weight of authority supports the proposition that, where the relief is merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his right must clearly appear. On the other hand, where the question is one of public right, and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party; and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special

interest in the result, it being sufficient to show that he is a citizen, and as such is interested in the execution of the law." High, Leg. Rem. § 431; *People v. Halsey*, 53 Barb. 547; *People v. Collins*, 19 Wend. 56; *County of Pike v. People*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *School Trustees v. Ball*, 71 Ill. 559; *State v. County Judge*, 7 Iowa, 186; *Hamilton v. State*, 3 Ind. 452; *State v. Gracey*, 11 Nev. 223; *State v. Eberhardt*, 14 Neb. 201; S. C. 15 N. W. Rep. 320.

That the defendant should discharge correctly the duties of his office in respect to the particular matter here sought to be enforced, is a subject-matter in which the relator as a citizen and voter of the county has a general interest, and, in the absence of any other vital objection affecting the remedy by *mandamus*, that interest is, of itself, sufficient to enable him to maintain this proceeding. Notice to the electors lies at the foundation of any popular system of government. Our laws in respect to elections are framed upon this system, and the duty enjoined upon the clerk by our statute in "naming the offices to be filled" in the election notices recognizes the importance of such a requirement; nor have we been referred to any cases wherein the courts have refused to sustain a proceeding in *mandamus* upon the relation of an elector, where the law devolved the duty upon the officer to give such notice. In *State v. Brown*, 38 Ohio St. 345, the court held that a proceeding in *mandamus*; to compel the sheriff to give notice and make proclamation to the qualified voters of the county to elect a judge of the court of common pleas therein, was properly instituted upon the relation of an elector of such county. The objection there was as here; but to this the court answered: "The relator, as a citizen of Clermont county, is interested in having the proper number of courts and judges to administer justice therein. As an elector he would be entitled to vote at the election, if an election were proper, and would be himself eligible to the office." In *Wise v. Bigger*, 79 Va. —, the question to be decided was as to the validity of an act of the legislature apportioning the representation of the state in congress. The proceeding was for a *mandamus*, instituted upon the relation of Wise as a citizen, and the court held that when the right sought to be protected or enforced by *mandamus* was a public right, it was sufficient that the relator was a citizen, and as such interested in the execution of the law, and that in such a proceeding it was the indisputable and clear function of the court to pass upon the constitutionality of legislative acts. See *Marbury v. Madison*, 1 Cranch, 172. We must therefore pass this objection as untenable.

The more important feature of this case remains now to be considered. The object of the proceeding is to determine whether that portion of the act of 1878 which provides for the election of circuit judges in 1886 is constitutional. This, in effect, is to determine whether the present incumbent of the office of circuit judge of the Second judicial district, and all others similarly situated, is filling an unexpired term, or a term of six years by election. The question,

therefore, to be decided is whether the office of circuit judge becomes vacant on the first Monday in July, 1886. The proper determination of this question must necessarily depend, in a great measure, on the construction to be given to several provisions of our constitution to which we shall presently advert. But there are some preliminary inquiries necessary to be made which will materially aid in the explanation of that construction. An "office" is defined to be a right to exercise a public or private employment, and to take the fees or emoluments thereunto belonging. 2 Bl. Comm. 36. It is said to be a public station or employment, conferred by the appointment of government. *U. S. v. Hartwell*, 6 Wall. 393; Abb. Law Dict. tit. "Office." In theory of the common law the king was the source of all power, and the disposer of offices. All public offices were granted by him on the condition of good behavior, and no public office could be granted for years or a term. Jac. Law Dict. tit. "Office." From whatever cause a vacancy might occur in a public office, the office reverted to the king, to be again filled, or granted by him for life, conditioned on good behavior, or *durante beneplacito*. As a consequence, there could not be a vacancy in the term of a public officer. At common law, therefore, vacancy, *ex vi termini*, means vacancy in the office and not in the term; and this is ordinarily the meaning attached to the word. When a "vacancy" is spoken of, we mean that the office is empty,—that it is without an incumbent who has a right to exercise its functions, and take its fees or emoluments. In this country, where written constitutions prevail, the great majority of public offices are elective, having a fixed term, for a prescribed number of years, with varying provisions as to filling vacancies. The term of an office is said to be a fixed period prescribed for holding the office, (*People v. Brundage*, 78 N. Y. 407,) and is the estate or interest which the incumbent has in it. 2 Bl. Comm. 144. When a vacancy happens by death, resignation, or removal, the term is gone, and the office reverts, as at common law, not to the king, but to the people, to be again filled, upon like conditions, for the full term prescribed, unless by express provision or manifest intent the constitution has limited or restricted the term of the new incumbent. Whether, therefore, the vacancy is in the office as at common law, and reverts to the people to fill for the full term prescribed; or, so to speak, the vacancy is in the term, and limited to filling for the unexpired portion thereof,—is made to depend upon the intent of the framers as expressed in the constitution. But when the constitution fixes a definite term of office, as for six years, without any limitation or reference whatever to unexpired terms, when a vacancy occurs, the common law acceptance, meaning vacancy in office, must be received and applied in the construction, and, when filled, the incumbent is invested with a full term of six years.

A reference to some of the adjudicated cases will illustrate the application of this principle. In *Ex parte Meredith*, 53 Grat. 120, the

question to be decided was whether Judge WEEDON was elected, and is entitled to hold, for the full constitutional period of six years, or for the remainder of Judge NICOL's unexpired term. The provision of the constitution was as follows:

"County judges shall be chosen in the same manner as the judges of the circuit court. *They shall hold their offices for a term of six years*, except the first term under this constitution, which shall be three years."

The court say:

"It will be observed there is no reference whatever to unexpired terms of judicial officers; \* \* \* whenever elected, and for whatever purpose elected, the incumbent shall hold for six years. The language is general and positive."

And the court held that the judge who had been elected to fill a vacancy occasioned by the death of the former judge, was elected for a full term of six years, and not for the unexpired term of the former judge.

In *Sansbury v. Middleton*, 14 Md. 313, the court was required to give a construction to the fourteenth section of the fourth article of the constitution, which provided that "there shall be in each county a clerk of the circuit court, who shall be elected" by the people, "and shall hold his office for the term of *six years from the time of his election*, and until a new election is held;" and, "in case of a vacancy in the office of a clerk," the judge of the court shall "appoint a clerk until the next general election of delegates held next thereafter, when a clerk shall be *elected to fill such vacancy*." BARTOL, J., in delivering the opinion of the court, said:

"By the express words of the section the term of office of a clerk to be elected by the people is declared to be for '*six years from the time of his election, and until a new election is held*.' This applies, not merely to the officer chosen at the first election, but to every one who is legally elected by the people afterwards; and is conclusive of the question before us, unless there is something found in the same section, or in some other part of the constitution, which limits the term of such officer. \* \* \* It is true that the word 'vacancy,' when used in written constitutions with reference to a public officer, sometimes signifies *an unexpired term*, but this is not necessarily so. It often relates merely to the office, without reference to the term, and in this case the very words of the section under consideration so limit and define it. The case provided for is a vacancy in *the office of clerk*, and the election is to fill *such vacancy*. What vacancy? Clearly in the *office*, and not in the *term*."

And it was held that a clerk elected by the people to fill a vacancy under this clause of the constitution held his office for six years from the time of his election, and not simply for the *unexpired term* of his predecessor.

In *Re Tenure of the Judges*, 16 Fla. 841, in which the supreme judges expressed to the governor their construction of a provision of the constitution of that state which provided "there shall be seven circuit judges appointed by the governor, and confirmed by the senate, who shall hold their office for eight years," the question to be decided was whether a judge of the circuit court, appointed by the

governor and confirmed by the senate, holds his office for eight years, in a case where there has been a previous incumbent who, while appointed for eight years, has filled the office only a part of the time. WESTCOTT, answering, said:

"There is nothing in this provision which limits the time of service of one appointed by reference to the time served by a previous one. \* \* \* Unless there is some other provision of the constitution limiting or otherwise explaining this language, it must have its usual and ordinary effect. There is nothing here establishing a term of office to exist between fixed dates of months or years; nor is there anything having the most remote reference to an unexpired term, or to a vacancy in an office, as distinct from the office itself. There is no other provision of the constitution which changes or affects this section."

And the conclusion reached was "that a judge of the circuit court, appointed by the governor and confirmed by the senate, holds his office for eight full years, and that no part of a previous eight years during which another has held the office (but who has vacated it) enters into the computation of the time for which the second appointee holds." In this state, where a similar question was involved upon a constitutional provision of like import, the holding of the court was consonant with this principle.

In *State v. Johns*, 3 Or. 533, the court, by McARTHUR, J., in construing a section of our constitution which provides for the election of, "in each county, for the term of four years, a county judge," held that, in the absence of any "constitutional or statutory prohibition," a county judge, whenever elected, holds for the full term of four years. See, also, *People v. Weller*, 11 Cal. 77; *Opinion of the Justices*, 61 Me. 603; *People v. Green*, 2 Wend. 266.

Section 3 of article 7 of the constitution of this state provides that "the judges first chosen under this constitution shall allot among themselves their terms of office, so that the term of one of them shall expire in two years, one in four years, and two in six years, and thereafter one or more shall be chosen every two years, to serve for the term of six years." Section 4 provides that "every vacancy in the office of judge of the supreme court shall be filled by election for the remainder of the vacant term, unless it would expire at the next election; and until so filled, or when it would so expire, the governor shall fill the vacancy by appointment." Section 10 provides that "when the white population of the state shall amount to two hundred thousand the legislative assembly may provide for the election of supreme and circuit judges in distinct classes, one of which classes shall consist of three justices of the supreme court, who shall not perform circuit duty, and the other class shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as supreme judges."

It will be perceived that the term of office prescribed by section 3 is limited and restricted, in the event of a vacancy, by section 4, to be filled by election for the remainder of the vacant term, unless it

would expire at the next election, etc. In 1878 the legislature, conceiving that the state contained the requisite population, passed an act which provided for the election of supreme and circuit judges in distinct classes, for the purpose of carrying into effect section 10 of the constitution. Prior to the act of 1878 the supreme judges did appellate and circuit duty under the constitution. Under that system there were two courts as now,—supreme and circuit,—but the judges who performed the duties of these courts were styled in the constitution “supreme judges.” There was no such officer as circuit judge *eo nomine*. The term of the supreme judges, who, in fact, performed the duties and filled both offices, was for six years, except that the supreme judges first chosen under the constitution were to allot their terms; but thereafter the term was for six years. But this term of the supreme judges, in case of vacancy by death, resignation, or otherwise, was to be filled by election for the remainder of the unexpired term. This necessarily affected both offices alike, notwithstanding the allotment, when a vacancy occurred, and limited the election of the new incumbent to the residue of the unexpired term. The latter part of section 10 provides that the circuit judges shall hold full terms without allotment, and take the same oath as the supreme judges. This language implies that the term of office, and the oath to be taken, are already provided for when the legislature shall make operative that section; and unless the term and oath mentioned in section 10 refer to the term and oath provided by sections 3 and 21 for the supreme judges when the constitution was adopted, there is no other term or oath to be found in that instrument to which they can apply, and the legislature has absolute discretion of the matter.

It must be clear, then, that the two classes of judges—supreme and circuit—which section 10 provided were to be elected in distinct classes were to take the same term which the constitution had provided for the supreme judges, with this difference: that the circuit judges were to take theirs without allotment. By the act of 1878, designed to carry into effect this provision, the supreme judges were to allot their terms after election, the same as had been done by the supreme judges when they were first chosen under the constitution, and the circuit judges were to take their terms without allotment. In all other respects, the two classes of judges derive their terms from the same source, and took the same term which the constitution had provided for the supreme judges when they were invested with the duties of both offices. Now, this term, although for six years, the constitution expressly provides, in case of a vacancy for any cause, shall be filled by election for the remainder of such vacant term. To the inquiry, how long shall the new incumbent hold who has been elected to fill a vacancy? the constitution makes an unequivocal and positive answer, “for the remainder of the *vacant term*.” What term? Clearly the term provided by section 3,—there is no other. The va-

cancy, then, is in the term, as contradistinguished from the meaning of "vacancy" at common law. It is the residue of the "vacant term" which is to be filled; so that when a vacancy occurs in the term given by section 3, and the power reverts to the people to fill, when filled, the person elected holds, not for the full term, but the unexpired term of his predecessor.

The common-law meaning of "vacancy" cannot be applied here without violating a commandment of the constitution. It is unqualifiedly admitted, when a fixed term is given for a prescribed number of years, without limitation or restriction as to unexpired terms, and a vacancy occurs, the common-law acceptance must be given to it, and the person elected holds for the full term. All the authorities show this, and many of them have been cited at some length to illustrate the application of the principle. But this effect cannot be produced without ignoring or erasing section 4 from the constitution. Blot out the limitation which it imposes upon the term given by section 3 when a vacancy occurs, and it is freely admitted, in the case of a vacancy, that the circuit judges, whenever elected, would be elected and entitled to hold for the full term of six years; but a like effect would not result to the supreme judges upon such a contingency, for the reason that it would violate the purpose for which the terms of these judges were required to be allotted.

But it is argued that the object of section 4 in confining vacancies to be filled to the residue of the vacant term was for the purpose of preserving the allotment prescribed by section 3, which the supreme judges were required to make, and as section 10 provided that the circuit judges shall hold their terms without allotment, therefore, say counsel, section 4 does not apply to them. The object of an allotment, undoubtedly, is to provide that officers sitting in the same body shall go out of office at different periods. Hence it is claimed, to maintain and perpetuate the system established by allotments, when a vacancy occurs, or an officer of such body fails for any reason to hold for his full term, necessarily and logically his successor must hold for the unexpired term of his predecessor. I grant this. But if such is the purpose and intention of an allotment, there is no need of section 4 to preserve it. The fact that it is provided that such officers, composing the body, are to allot their terms when first chosen, writes out plainly and unmistakably the intention or object to be subserved by the allotment, and renders unnecessary and needless any declaration or provision to preserve it. What need, then, of section 4? Erase it from the constitution, and you do not destroy the allotment, or affect the intention for which it was established. The allotment, and the purposes it was intended to embrace, can stand without it. Section 3 provided for the allotment of the terms of the supreme judges, and, to preserve the purpose of that allotment, vacancies occurring by reason of death or resignation would have been necessarily and legally limited to filling for the remainder of the vacant term. See *Baker*

v. *Kirk*, 33 Ind. 524. The system then designed to be established and perpetuated by the allotment can be preserved and kept up without the presence or need of section 4 in the constitution.

It must, then, have been inserted in that instrument to cover and effect some further purpose. What is that purpose? Clearly, when taken in connection with the other provisions, to provide that vacancies occurring by death, resignation, or removal, in the term given by section 3, should be filled by election for the remainder of the vacant term. The framers of the constitution did not design alone for the present, but section 10 shows that they had the future in contemplation, and were then providing a term and oath which should apply to supreme and circuit judges when the prosperity of the state, based upon the requisite population, should require that they be elected in distinct classes; and by these provisions they intended that whoever was entitled, under the constitution, to hold the term prescribed by section 3, in the event of a vacancy, should take it subject to the limitation prescribed in section 4. They intended that when this section of the constitution should go into effect the words "circuit judge" should be incorporated in the constitution. The fact that section 4 reads "vacancy in the office of the supreme judge," does not affect the question; for section 3, from which the term of both classes of judges are now conceded to come, applied, by its literal reading, only to supreme judges. To read either section literally, neither can be made to apply to circuit judges, for there was no such judge *eo nomine* before the act of 1878. So, too, with the oath to be taken. Section 10 provides that the circuit judges shall take the same oath as the supreme judges. There is no other oath to which this can refer, except the oath provided for the supreme judges by section 21, when the constitution was adopted. Whatever that oath prescribes for one it prescribes for the other, and one is as much legally bound by it as the other. The truth is, when the act of 1878 made operative section 10 of the constitution, the effect was to write into these provisions "circuit judge." The only difference in the particular here referred to, is that the circuit judges, by the provision, take full terms without allotment. For this the act of 1878 provided. When the first members of this court were chosen by election under that act we allotted our terms. At the same time, when the circuit judges were elected, they were elected to hold full terms, without allotment, and these they yet hold, unless some one of them has died or resigned, whereby a vacancy was created. In that event, the constitution has expressly provided that the vacancy "shall be filled by election for the remainder of the vacant term;" nor is our constitution peculiar or alone in thus restricting the filling of vacancies in the office of supreme and circuit judges to the residue of the vacant term. Reference to the constitutions of other states will show that they also have provided, when a vacancy occurs in these offices, that the successor shall be elected for the un-

expired term, and, in some instances, when the vacancy occurs in the office of any judge.

In my judgment, the act is not in conflict with the constitution, and may be carried into effect without violating any of its provisions.

The judgment is affirmed.

THAYER, J., (*concurring.*) This case is evidently here to obtain an advance decision of this court as to the constitutionality of a part of the act of 1878 which provides for the election of supreme and circuit judges in distinct classes. There seems to have been a question raised by some parties as to whether the circuit judges elected at the last state election hold only until the first day of July, 1886, as provided in said act, or for four years thereafter, and this proceeding is devised to have this court express an opinion upon it. The appellant, as county clerk of Lane county, has refused to deliver a notice to the sheriff of that county naming the office of circuit judge of the Second judicial district of the state to be filled at the ensuing state election, to be held on the first Monday of June next, and the relator, who has no apparent interest in the matter beyond that of any other citizen in the community, has attempted to compel him to do so by *mandamus*; not because the refusal to deliver such notice will affect the right to proceed and elect a circuit judge, but to ascertain who will be entitled to the office in case another should be elected in place of the present incumbent. It is a very summary mode of settling constitutional questions, and brushing away the provision of a statute liable to incommode some one unless removed; but, for my own part, I am utterly opposed to making inquiry as to the constitutionality of a statute of the state under such a proceeding,—think it premature. Such matters are too grave to be trifled with, and should not be considered until the question arises that makes it necessary. A statute, duly enacted, is the highest authority known to the law, and every legislative enactment adopted in accordance with the forms prescribed in the constitution is presumed to be an expression of sovereign will. Its validity should not be questioned unless destructive of the rights of a party, or injurious to public interest, and should never be declared invalid without mature deliberation, aided by all the light that can be shed upon the subject. This rushing a case into court through the means of special proceedings, and obtaining a hasty and ill-advised decision upon a matter of great magnitude, I cannot regard as proper, and am apprehensive that it will result in establishing damaging precedents. What security can the people have in the permanency of law, if the solemn enactments of their legislative assembly can be so easily overthrown? Their endurance would be made to depend upon the mere caprice of the courts.

The legislature of this state, at the September session in 1878, passed an act providing for the election of supreme and circuit judges, in distinct classes, which contained the following provision:

"There shall be elected, on the first Monday in June, 1880, a circuit judge in each of the judicial districts, as they now exist in this state, whose terms of office shall commence on the first Monday in July, 1880, and continue for six years, and until their successors are elected and qualified; and at the general election in 1886, and every six years thereafter, there shall be elected a circuit judge in each of the said judicial districts, whose terms of office shall commence on the first Monday in July thereafter, and continue for six years, until their successors are elected and qualified."

One of the members of that body which enacted the provision, and another who had participated in the proceeding, are at present members of this court, and they are solicited, in the latter capacity, to nullify what they did in the former, because, I suppose, another construction can be given the constitution under which the act was adopted different from that they placed upon it, and possibly more acceptable to more acute minds, though not a particle better or more practical in any view. The legislature that adopted the act very likely construed section 4 of article 7 of that instrument, which reads, "every vacancy in the office of judge of the supreme court shall be filled by election for the remainder of the vacant term, unless it would expire at the next election, and until so filled, or when it would so expire, the governor shall fill the vacancy by appointment," as applying to circuit judges as well; and there are cogent reasons in favor of that construction. The constitution provided for one set of judges to perform, in the outset, supreme and circuit court duties. They partook of the character of both, performed circuit duty the same as the present judges, and were elected in the several districts in the same manner circuit judges are elected, though they were termed in the constitution "justices of the supreme court" and "judges of the supreme court," and performed supreme court duty, but seem to be regarded in the constitution as circuit judges also; and the framers of it were evidently under the impression that whenever they referred therein to the class of judges who were to perform the several functions mentioned, that the term employed would apply to circuit judges when elected in a distinct class, and that the same rules applicable to one class in the beginning would apply to both when separated.

Section 10 of article 7 of the constitution provides as follows:

"When the white population of the state shall amount to 200,000, the legislative assembly may provide for the election of supreme and circuit judges in distinct classes; one of which classes shall consist of three justices of the supreme court, who shall not perform circuit duty, and the other class shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as the supreme judges."

Section 3 of article 7 of the constitution provides that—

"The judges first chosen under this constitution shall allot, among themselves, their terms of office, so that the term of one of them shall expire in two years, one in four years, and two in six years; and thereafter one or more shall be chosen every two years, to serve for the term of six years."

This is the only provision in the instrument in regard to allotting the terms of the judges, and that applied to the judges first chosen, or

justices or judges of the supreme court. No one would suppose that the circuit judges would allot among themselves their terms of office in the absence of said section 3, nor if said section could not have applied to them, which it did not in terms; but the convention seemed to think it would unless they were specially exempted therefrom, and it therefore, in section 10, provided, in effect, that they should hold "full terms without allotment."

Now, if section 3 would have applied to said circuit judges, then certainly section 4 would, and that was allowed to stand unqualified. Again, the language of section 10 clearly indicates that the convention supposed that the judges named in the sections 3 and 4 included the circuit judges thereafter elected. The words "when the white population of the state shall amount to 200,000 the legislative assembly may provide for the election of supreme and circuit judges in distinct classes," imply that there were then supreme and circuit judges, but were elected in *one* class. It is reasonable that such an idea should have prevailed. Under the provisional system adopted, the functions of the two offices were blended in one. The same judge performed both, and was, in fact, both supreme and circuit judge; and the convention would naturally suppose that the general provisions employed in the constitution applicable to the justices or judges of the supreme court as they existed under the old *regime* would apply to both classes when formed out of the one, unless a negative provision was made. The fact that the words "judge of the supreme court" are used in said section 4 signifies nothing, when it is understood that they also included "judge of the circuit court." It is unimportant as to what the words of themselves would import; it is more important to ascertain what the convention who framed the constitution intended by them. The legislature that passed the act in question evidently construed the constitution as indicated, else it would most probably have made provisions for filling vacancies. By construing said section 4 as mentioned, it avoided the necessity. This construction may not, possibly, be the correct one, but it is reasonable, and has received the sanction of able members of the bar. Messrs. Chapman & Hewitt have kindly submitted a brief in the case in which they indorse this view, and their reasoning in support of it is very thorough and convincing. The counsel for the respondent who argued the case at the hearing have presented strong proofs in its favor; and I cannot see any necessity nor good policy in giving it a different construction. Courts must be conservative, or they will do more harm than benefit; nor should they set themselves up as the embodiment of all the wisdom in the land.

What is to be gained by rejecting the evident legislative construction in question, and adopting the one contended for by the appellant's counsel? The former is certainly reasonable, while the latter leads to an apparent absurdity. They contend that the constitution accords to the circuit judges an absolute six-years term, and, when

inquired of as to wherein the constitution provides such term, they refer to said section 3, art. 7; but that section does not mention circuit judges *eo nomine*. It says: "The judges first chosen under this constitution," and the "one or more" thereafter chosen. The judges first chosen were "the four justices" of which the supreme court consisted as provided by section 2 of said article 7. The counsel cannot appropriate the term provided for "the four justices," and "the one or more" thereafter chosen, and apply it to the circuit judges elected in a distinct class, unless they assume the construction the legislature adopted,—that is, that "the judges first chosen" were "circuit" as well as "supreme" judges,—and that will upset their claim entirely. They will get too much, for when they concede that the original judges occupied the dual capacity before referred to, and that the term given to them extended to circuit judges that should thereafter be elected in a distinct class, they tacitly admit that every provision applicable to the former judges applies to the latter, unless inhibited by some other provision in the constitution; and the result unavoidably follows that if said section 3 applies to circuit judges, as suggested, then said section 4 unquestionably does. It is not a case where "one shall be taken and another left;" both sections must be taken, or not either.

Upon the other hand, if it be conceded that the legislature is authorized to provide the term of those judges, it must also be conceded that the provision of the statute referred to merely does that by providing when the election of circuit judges shall take place. It did not provide that any election should be had intermediate the six years, but it put an end to every term at certain dates, beyond which an incumbent, whether holding by appointment or under an intermediate election, must be superseded. When the legislature has a right to provide a term of office for a class of officials, it certainly has the right to make it uniform. It has done that in this case by providing a particular time at which they must all be elected and enter upon their duties. It seems very evident to my mind that, whichever horn of this dilemma the appellant's counsel may take, they must fail to establish the unconstitutionality of the act in question. If they attempt to maintain that the term of office of the circuit judges is provided for in the constitution, they must admit that when the framers of the constitution used the words "justices of the supreme court" they intended "circuit judges" as well, and that their mode of selection, qualification, and tenure of office, and the manner of filling vacancies, that would apply to the former after the two should be chosen in distinct classes, would apply to the latter, unless expressly negated by some provision of that instrument; and if, on the other hand, they admit that the term of office of circuit judges may be provided by the act of the legislature, they must necessarily fail in showing that the legislature, in adopting the act in question, exceeded its authority. It will be noticed that the language of said section 10 of article 7 of the constitution empowered the legislature

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to provide for the election of the two sets of judges in distinct classes. It is a "class" of judges the election of which is to be provided for. The act to be adopted should properly apply to them collectively. A provision, therefore, that they should hold their term of office for the period of six years; that they should be elected at the general election in June, 1880, again in June of 1886, and every six years thereafter; that their term of office should begin on the first day of July of the several years at which the election takes place,—seems to me to be within the power conferred; that it comes fairly within the authority vested in the legislature by the section of the constitution referred to, unless the other view suggested be the correct one.

If it had been provided in the constitution, by a direct clause, that there should be elected in each judicial district in the state, for the term of six years, a circuit judge, at times to be regulated by the law, and there was no other "constitutional or statutory provision on the subject, as said in *State v. Johns*, 3 Or. 533, it might be claimed with some reason that, whenever an election occurred at which such judge could properly be elected, his election would be for a full term; but in the present case the legislature provides for the election of circuit judges as a class, and to fix the particular years in which to be elected is clearly within its power, and whether, in the absence of a legislative provision, a vacancy, occasioned by the death, resignation, or removal of a predecessor, can be filled by election for the unexpired term, depends upon whether said section 4 of article 7 of the constitution is applicable or not. Much has been said by some of the counsel on both sides in regard to 'the term attaching to the office,' and attaching to the person of the judge;" but I must say that I do not understand what is meant by it. That expression has been used in cases, and possibly it conveys a meaning to the minds of others; but to me it is meaningless. Under our theory of government a civil office is simply a public trust, belongs to the public, and is instituted for public benefit, and the time a person is entitled to discharge its duties and receive its emoluments depends upon the terms of the law under which he holds it; and that can be changed by the power which enacted it, and cut off the official in the very prime of his career. I repudiate the expression as anti-republican. I have carefully considered the question before the court, and while my mind is not altogether unbiassed, as I entertain a lurking notion that the proceeding was set on foot to promote personal ends, yet I have tried to view it fairly, and am of the opinion that the said part of the act is valid. Our constitution upon the subject is *sui generis*, and must be interpreted in view of its various provisions and general scope and design. I am satisfied that the proceedings upon the *mandamus* should be enforced.

WALDO, C. J., (*dissenting*.) It is an invariable rule of the common law that when an office granted for years reverts to the people before the expiration of the term for which it was granted, and the office is

granted anew, the new incumbent takes the office without reference to the unexpired term of his predecessor, unless there be a contrary intent expressed in the grant itself, or there be some limitation imposed on the granting power. It is conceded that this rule governs the tenure of office of the circuit judges of this state; for there is not only no limitation of the rule as applied to the one in the constitution, but, in fact, the framers of that instrument have used affirmative language which forbids a contrary interpretation. It will be conceded that the office of circuit judge is a constitutional office,—that is, an office created by the constitution; that it was not only created by, but that it came into existence with, the constitution, as an office distinct from the office of supreme judge; for two offices may be distinct, though the officer be the same person. *Crow v. Ramsey*, T. Jones, 11. The supreme judges, however, formerly performed the duties of the office of circuit judge. They were, by virtue of their offices as supreme judges, judges also of the circuit courts. They held both offices under one title,—that of “judge of the supreme court.” A full term of a judge of the supreme court was six years. He was *ex officio* judge of the circuit court for the same period. The constitution gave the legislature power, in section 10, art. 7, of the constitution, to establish circuit judges as a distinct class, but without power to change the term for which the office had been held, except that circuit judges should hold full terms without allotment. The word “term” in this connection has a precise signification. It is said in *Wright v. Cartwright*, 1 Burr. 285, that the word “term,” in the phrase “term of years,” may signify, “not only the limits and limitations of time, but also the estate and interest which passeth for that time.” Counsel seem to have had some sort of idea that the word had some such double signification in the constitutional provision in question; but such is not the fact. When applied to office, “the word ‘term’ is invariably used to designate a fixed and definite period of time.” *Speed v. Crawford*, 3 Mete. (Ky.) 185. The only question, therefore, open, is, what is the duration of the term referred to? If it be eight, six, or any other number of years, then the plain reading of the constitution is that the circuit judges shall hold full terms for such number of years without allotment. If there were any room for construction of language, apparently so plain and unambiguous, we have in *State v. Johns*, 3 Or. 533, a case exactly in point. This was so evident to some of the counsel that the force of that case was attempted to be avoided by a distinction supposed to exist between the two cases in this: that in our case we have an act of the legislature declaring that unexpired terms shall be filled for the remainder of the vacant term, whereas in that case there was no such act. That decision went upon the ground that Johns held a commission from the people, which entitled him, under the constitution, to hold for the term of four years. The legislature could not, therefore, limit such holding to the remain-

der of an unexpired term without thereby regulating the tenure for office fixed by the constitution itself. And such is the view of all the authorities.

Supreme judges took their offices originally by allotment. Now, if the system which the allotment was intended to introduce shall not be, in course of time, disarranged and destroyed, it is absolutely necessary that in every case in which an office shall be vacated before the expiration of the time for which the incumbent shall have been elected, that the office shall be filled, not for a full term, but for the remainder of the term remaining unexpired of the predecessor. The reason for this is plain to all. But there is no reason why circuit judges, like county judges of their courts, should take their offices by allotment, or, consequently, why they should take for unexpired terms; and it would seem impossible for the English language to express briefly, and yet in clearer terms, the intention of the framers of the constitution that circuit judges should not take by allotment, and should not take for unexpired terms, when it is declared in so many words that they should take "full" terms without allotment. They seem to have added, *ex majore cautela*, the word "full" to the sentence, thereby expressly excluding the terms which were not full. No circuit judge should ever take a term which was not full, which he must do were he to take for the unexpired term of a predecessor.

Therefore, if the word "term" signified, as we have seen that it does, duration merely, and not the quality or interest in the office, there can be no ambiguity whatever in the declaration that circuit judges shall hold full terms, without allotment, except the duration of the term which they shall hold. If the duration of the term be ascertained and fixed at a certain number of years, as we have seen that it is fixed at six years by the strongest implication, all ambiguity is removed. Circuit judges shall hold full terms of office of the duration of six years, without allotment. This construction is not only that of the letter and the spirit of the constitution, but is that which is authorized by the universal current of authority. See *Opinion of the Justices*, 16 Fla. 841; *Opinion of the Justices*, 61 Me. 601; opinion of Lewis, J., *Burks v. Hinton*, 77 Va. 41; *Sansbury v. Middleton*, 11 Md. 296; *People v. Burbank*, 12 Cal. 378; *Hughes v. Buckingham*, 5 Smedes & M. 632; *Attorney General v. Brunst*, 3 Wis. 787; *State v. Johns*, 3 Or. 533, and cases cited.

## SUPREME COURT OF NEVADA.

(19 Nev. 332)

STATE *ex rel.* COFFIN v. COUNTY COM'RS.

Filed May 15, 1896.

## 1. CONSTITUTIONAL LAW—ST. 1885, CH. 60—DISTRICT COURTS—POWER OF LEGISLATURE TO INCREASE OR DIMINISH DISTRICTS.

Sections 1-8, St. 1885, c. 60, (Gen. St. 2485-2494,) providing, in effect, that the state shall form one judicial district, for which three judges shall be elected by the qualified electors of the state, is not unconstitutional as involving a contravention of the constitution, art. 6, §§ 1, 5, 6, providing that there shall be nine judicial districts, but giving the legislature power to alter the boundaries, and increase or diminish the number of judicial districts and judges therein, one judge to be elected in each of the respective judicial districts.

## 2. SAME—TITLE OF ACT—"ONE SUBJECT."

The title of the act, "An act to redistrict the state of Nevada, prescribe the number and salaries of district judges, and fix the places of holding courts," does not contravene section 17 of article 4 of the constitution, and embraces "but one subject, and matter properly connected therewith."

## 3. SAME—POWERS, DUTIES, AND FUNCTIONS OF JUDGES.

Section 4, giving the judges equal jurisdiction and power, authorizing them to hold court in any county, and to exercise the powers, duties, and functions of the court and of judges in chambers, and to transact judicial business in the same county, at the same time, does not give the judges at chambers the powers, duties, and functions of a court, nor invest them with any other power than is presently possessed by the district judges under the constitution.

## 4. SAME—TRANSACTION OF BUSINESS—"NON-JUDICIAL DAYS."

Section 5, providing that "the district court shall always be open for the transaction of business," does not abolish the existing "non-judicial days," and even if it did, would not be beyond the powers of the legislature.

## 5. SAME—JUDGES' SALARIES—PAYMENT.

It is not in contravention of section 15, art. 6, of the constitution, to provide that the judges' salaries shall be paid quarterly out of the county treasuries into the state treasury, and by the state treasurer paid to the judges in monthly installments.

## 6. SAME—FEES OR PERQUISITES—NECESSARY TRAVELING EXPENSES.

The prohibition contained in section 10, art. 6, of the constitution, against the judges receiving to their own use "any fees or perquisites of office," does not apply to "the necessary expenses actually paid by them, for traveling by public conveyance, in going to and from the place of holding court."

## 7. SAME—SELECTION OF PRESIDING JUDGE.

The authority given to the judges by section 9 of the act, to "select one of their number for presiding judge," does not contravene any provision of the constitution. The judges, without any statutory authority, could have selected one of their number for presiding judge.

## 8. SAME—TIMES OF HOLDING COURTS.

The provision in section 9 that the courts shall be held in each county at least once in every six months, is a compliance with section 7, art. 6, of the constitution, which declares that "the times of holding the \* \* \* district courts shall be as fixed by law."

Application for *mandamus*. The opinion fully states the facts.

*J. H. MacMillan, S. D. King, Thos. Wells, H. F. Bartine, and T. Coffin*, for relator.

*R. M. Clarke and B. H. Lindsay, for respondents.*

HAWLEY, J. On the fifteenth of February, 1886, respondents issued a notice that an election would be held on Tuesday, the second day of November next, for state, county, and township officers, including "three district judges for the district of Nevada; and refused, upon the demand of relator, to issue a notice for the election of "one district judge for the Second judicial district of the state of Nevada, comprising Ormsby and Douglas counties." This proceeding was instituted in this court to procure a writ of *mandamus* to compel respondents to issue such a notice.

Is the act entitled "An act to redistrict the state of Nevada, prescribe the number and salaries of district judges, and fix the places of holding courts," (St. 1885, 60; Gen. St. 2485-2494,) constitutional? Is it within the power of the legislature to so redistrict the state as to make but one judicial district? Did the framers of the constitution intend to place any restriction upon the power of the legislature to fix the number of judicial districts, or to prescribe the number of the district judges?

1. The first and most important question is whether sections 1, 2, and 3 are constitutional? These sections read as follows:

"Section 1. On and after the first Monday in January, A. D. 1887, the state of Nevada shall constitute one judicial district.

"Sec. 2. At the general election in the year 1886 there shall be elected three judges, who shall be judges of said district.

"Sec. 3. The district judges shall be elected by the qualified electors of the state of Nevada, and shall hold office for the term of four years from and after the first Monday of January next succeeding their election."

The constitution of this state declares that "the judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace." Section 1, art. 6. "The state is hereby divided into nine judicial districts. \* \* \* The legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed, and also for increasing or diminishing the number of judicial districts and judges therein. \* \* \* There shall be elected, at the general election which precedes the expiration of the term of his predecessor, one district judge in each of the respective judicial districts, (except in the First district, as in this section hereinafter provided.) The district judges shall be elected by the qualified electors of their respective districts. \* \* \*" Section 5. "The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity. \* \* \*" Section 6.

The framers of the constitution created a judicial system which involved, for the time being, a division of the state into judicial districts. There is therefore no need of any extended consideration of the meaning of the word "district," as used by lexicographers and found in law dictionaries. It will be admitted that the meaning of

the words "district" and "districts," as applied to the judicial system thus created by the constitution, had reference to a part or portion of the state. This must be so, because nine districts were expressly named. But what did the framers of the constitution mean by giving the legislature power to alter the boundaries or divisions of the districts prescribed by the constitution, and to increase or diminish the number of judicial districts, and the judges therein? Is not the whole subject-matter left to the wisdom of the legislature to arrange, in such manner as the necessities of the people may require?

The question, in so far as it relates to increasing or diminishing the number of district judges, is settled by the decision of this court in *State v. Kinkead*, 14 Nev. 117. Is it not equally as evident that it was the intention of the framers of the constitution to invest the legislature with absolute power to arrange the number of judicial districts, and, if necessary to meet the wants of the people, to reduce the number to one? True, the opinion in *State v. Kinkead* only discusses the question in so far as it relates to the number of judges in Storey county; but are not the provisions of the constitution as clear in the one case as the other? There is no prohibition upon the power of the legislature to increase the number of judicial districts; is there any restriction upon the power of the legislature to diminish the number of judicial districts? There is no express, and, in our opinion, no implied, provision to this effect. Is it not apparent, from all the provisions of the judicial department, that it was the intention of the framers of the constitution to leave the number of the judicial districts, and the number of judges, to be determined by succeeding legislatures? The members of the constitutional convention made a provisional arrangement to set the courts in motion so as to meet the then condition of affairs in this state; but at that time they realized the fact that the mining excitement, and the litigation arising therefrom, in Storey county, might cease; that other counties might, in the future, be placed in the same condition, and have an increase or diminution in population and judicial business; that the population in this state being then nomadic, and hence uncertain, it might, in the future, become necessary to have the boundaries of the districts, as provisionally established, altered or changed, and the number of judicial districts and judges therein increased or diminished, so as to conform to the condition of existing affairs from time to time, and to be regulated by the amount of judicial business to be transacted in the various counties of the state. This could only be done, as it was done, by the adoption of a provision which would, without any restrictions or limitations expressed or implied, give this power to the legislature. This is why they said, in plain terms, that notwithstanding the provisional arrangements embodied in this constitution, and the language used to enforce the same, the legislature may in the future, "provide by law for an alteration in the boundaries or divisions of the districts herein prescribed; and also

for increasing or diminishing the number of judicial districts and judges therein."

The only limitation upon the legislative power in this respect is found in the clause that no "change shall take effect except in case of a vacancy, or the expiration of the term of an incumbent of the office." The change made by the act in question does not take effect until the expiration of the term of the present judges. It does not, therefore, violate this clause of the constitution. The clause that "the district judges shall be elected by the qualified electors of their respective districts" is not violated if it be true that the legislature has the power to diminish the number of judicial districts to one. It is fair and reasonable to presume that the framers of the constitution, if they had intended to place any other restrictions upon the legislative power, would have used apt words to express such intention, and inserted a provision to the effect that in no event should the number of districts be diminished to less than two, nor increased to more than the whole number of counties existing in the state.

In the constitution of some of the states the matter is definitely fixed without any power whatever in the legislature to change or alter the same in any respect; in others, the entire question is left to the legislature; but in a large majority of the states the power is given to the legislature to change, increase, or diminish the number of circuits or districts, and wherever any limitation upon this power exists, it is stated in clear and positive terms. Thus, the constitution of Alabama provides "that the state shall be divided into convenient circuits, and each circuit shall contain not less than three, nor more than six, counties." Const. 1819. In California it is provided that "the state shall be divided by the first legislature into a convenient number of districts, subject to such alteration from time to time as the public good may require." Const. 1849. In Iowa the state is divided into 11 districts, "and after the year 1860 the general assembly may reorganize the judicial districts, and increase or diminish the number of districts, or the number of judges of the said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session." Const. 1857. In Kansas "the state shall be divided \* \* \* into three common-pleas districts of compact territory, bounded by county lines, and as nearly equal in population as practicable." Const. 1855. This provision is taken from the constitution of Ohio of 1851. In Louisiana the constitution of 1845 provides that the legislature "shall divide the state into judicial districts, which shall remain unchanged for six years;" and that "the number of districts shall not be less than 12 nor more than 20." In Mississippi "the state shall be divided into convenient districts, and each district shall contain not less than three, nor more than twelve, counties." Const. 1832. In New York "the state shall be divided into eight judicial districts, of which the

city of New York shall be one; the others to be bounded by county lines, and to be compact and equal in proportion, as nearly as may be. There shall be four justices of the supreme court in each district, and as many more in the district composed of the city of New York as may, from time to time, be authorized by law; but not to exceed in the whole such number, in proportion to its population, as shall be in conformity with the number of such judges in the residue of the state, in proportion to its population." Const. 1846. In Pennsylvania "not more than five counties shall at any time be included in one judicial district." Const. 1838. In Oregon "the number of justices and districts may be increased, but shall not exceed five until the white population of the state shall amount to one hundred thousand, and shall never exceed seven." Const. 1857.

These constitutions, and others of like import, were adopted prior to our constitution, and it must be presumed that the members of the constitutional convention had knowledge thereof. The clause from the constitution of New York was frequently referred to in the debates. In the light of this history, how can it be said that the convention intended to place any limitations, restrictions, or prohibitions upon the power of the legislature to enact a law "increasing or diminishing the number of judicial districts and judges?" These words were taken from the constitution of Iowa, and the restrictions imposed by that constitution are omitted. There is no express provision requiring the legislature of this state to maintain "a convenient number of districts;" that the districts shall be "of compact territory, bounded by county lines;" that the districts "shall be as nearly equal in population as practicable;" that each district "shall contain not less than three, nor more than six," or any other number, of counties; or any other words which, by fair and reasonable interpretation, can be construed as a limitation of power upon the legislature to do what the constitution, in direct, plain, and express words, declared it might do,—“diminish the number of judicial districts.” There is nothing in the debates of the constitutional convention, to which our attention has been called, that indicates any intention upon the part of the framers of the constitution to prohibit the legislature from reducing the number of judicial districts to one.

It is contended on behalf of relator that although the language of the constitution does not impose any restrictions in positive terms, yet its spirit and true intent is violated by the act in question by the implications which arise from the ordinary meaning of the plural words "district courts" and "judicial districts." It is claimed that the term "district" is always used in the constitution "in the sense of a defined and segregated portion of the state." The result of this argument would be to give the legislature power to establish as many districts as it pleases; but no matter what condition the state may be in, or the amount of judicial business to be transacted therein, it cannot reduce the districts to less than two; that the legislature

might, therefore, include all the counties in the state but one into a judicial district having one judge, and make the other county another judicial district, and it would be a compliance with the implied prohibition for which relator contends. Is not this too narrow a view to take of the various provisions of the constitution relating to the judicial department? Is it not placing too much stress upon the form, and overlooking the substance, of the constitutional provisions? This argument, based upon the meaning of the plural words, to quote the language of BEATTY, C. J., "though elaborate, and very ingenious, is still far from convincing. Its fundamental fault is that it attempts, by the application of narrow and technical rules of statutory construction, to wrest the provisions of the constitution above quoted from their obvious meaning." *State v. Kinkead, supra*. It gives to the words "district courts" and "judicial districts" greater significance than the framers of the constitution intended they should have. The object was to establish courts with a defined jurisdiction,—such courts as would be necessary to transact the judicial business in the various counties of this state.

A court is a tribunal established for the administration of justice, and is composed of one or more persons, assembled under authority of law for the hearing and trial of causes, and the transaction of judicial business. "An organized body, with defined powers, meeting at certain times and places, for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers." Abb. Law Dict. It is true that the name given to the respective courts is usually selected with reference to its peculiar character; but it is not of such importance as to control, in any manner, its jurisdiction, power, or authority. The framers of the constitution of this state might have given any other name to the courts than that of "district." Most of the members of the constitutional convention came direct to this state from California, where a system of numerous courts in the respective counties prevailed. There were district courts, and judicial districts composed of one or more counties. There were county courts, and court of sessions, in every county in that state. The prevailing idea of the members of the convention was to make such a provisional arrangement as would give to every county in this state a court; that if every county had a court, it would be unnecessary to provide for more than one court. The name "district courts" seems to have been selected because it was deemed to be a name of higher grade and greater dignity than "county courts;" but these courts, with the power and jurisdiction as given by the constitution, might, appropriately, have been called "county courts," and the judge or judges thereof might have been elected to preside over such courts in one or more or all the counties, notwithstanding the fact that the term "county courts" is ordinarily given to courts confined to each county. The courts might have been called courts of "common pleas," "gen-

eral courts," "courts of appeal," or any other name which pleased the fancy of the members of the convention. It is the jurisdiction conferred upon the court that gives it its power and authority, and not its name. The name "supreme court," for instance, indicates that it is a court of the highest authority in the state, and so it is in this state; yet in New York this name is given to courts possessing similar jurisdiction to that given to the district courts in this state, and the name "court of appeals" is given to the highest court. In Texas the name "court of appeals" is given to a court having appellate jurisdiction in criminal cases, and the name "supreme court" applied to the court having appellate jurisdiction in civil cases.

Instead of "judicial districts" the framers of the constitution might have used the words "judicial courts," "judicial circuits," or "general courts," "one," "two," "three," etc. The word "district" does not always mean a part or portion of a country, state, or territory. "Judicial districts are districts created for judicial purposes, for defining jurisdiction of courts, and distributing judicial business." Abb. Law Dict. "By successive extensions of meaning, this word has gradually lost its original and peculiar signification, and is now constantly used, in ordinary language, to denote *any* extent of territory, for *any* purpose." Burr. Law Dict. "The circuit or territory within which a person may be compelled to appear." Rap. & L. Law Dict. There is no such positive or implied meaning in the use of the words "district courts," "judicial districts," or "district" as would authorize us, in the absence of any express clause limiting the power given to the legislature, to declare that the several counties in this state could not, by a legislative act, be included in one judicial district.

The constitution deals with subjects which are intended to govern the people in their rights and privileges. In treating of the judicial department, it declares in what courts "the judicial power of this state shall be vested." It defines the jurisdiction and authority of these courts, and specifies the powers possessed by the judges. It is therefore of no moment that the plural words "judicial districts" were used. It is the courts with their jurisdiction and authority, and the powers and duties of the judges, as defined in the constitution, that are to be protected and preserved. Significance is to be given to this subject more than to the plural words, which were employed solely with reference to the provisional arrangement of districts as made in the constitution, without any intent upon the part of the framers of that instrument to control the power of the legislature in diminishing the number of districts.

Under the act of 1885 each county in this state will have a district court possessing the jurisdiction, power, and authority given to it by the constitution. The judges to be elected under this act will have precisely the same power and jurisdiction, in the transaction of judicial business, as is now possessed and exercised by the present

district judges. The number of judicial districts has been changed from seven to one, and the judges are to be elected "by the qualified electors" of this district, which embraces all the counties in the state. We admit that "implied prohibitions, if they plainly exist in a constitution, have all the force of express prohibitions," (*State v. Arrington*, 18 Nev. 415; S. C. 4 Pac. Rep. 735;) but when the fundamental law has not limited, either in direct terms or by necessary implication, the general powers conferred upon the legislature, we should not declare an act void solely upon the ground that it may be opposed "to a spirit supposed to pervade the constitution, but not expressed in words," (Cooley, Const. Lim. 208.) "To do so would be to arrogate the power of making the constitution what the court may think it ought to be, instead of simply declaring what it is." *Walker v. City of Cincinnati*, 21 Ohio St. 41. In whatever direction we approach the question, we are irresistibly led to the conclusion that the legislature has the absolute power to fix, by law, the number of judicial districts, and the number of judges therein, and that, in the exercise of this power, one district may be made of the entire state for the purpose of apportioning the judicial business to be transacted therein by the district judges.

2. Objection is made to the title of the act. It is argued that the act in question is in conflict with section 17 of article 4 of the constitution, which declares that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which shall be briefly expressed in the title." In discussing this provision of the constitution in *State v. Silver*, 9 Nev. 231, this court said:

"Its design has frequently been declared to be the prevention of improper combinations to secure the passage of laws containing subjects having no necessary or proper relation, and which, as independent measures, could not be carried; and also, as expressed by Judge GARDINER in the case of *Sun Mutual Ins. Co. v. Mayor*, 4 Seld 253, 'that neither the members of the legislature nor the public should be misled by the title.' The construction placed upon the clause is that the details of a legislative act need not be specifically stated in the title, but matter germane to the subject, and adapted to the accomplishment of the object in view, may properly be included."

Applying this doctrine to the case in hand, it seems clear to our minds that the objections urged by relator are not well founded. The act does not abolish the judicial districts of this state; it simply diminishes the number of districts. The word "redistrict" was not evasive of the subject of the act. It was not misleading. It called the attention of the legislature, and of the people, to the fact that it was proposed, by the act, to make a change in the judicial districts,—to district the state over again. It may be that the title of the act is not as "briefly expressed" as it might have been. It was unnecessary to state the details of the act in the title. "An act to redistrict the state" would have complied with the requirements of the constitution, and all matters that were necessary for

the accomplishment of this object could have been included; but the additions made to this title are in no sense misleading. They relate to matters which are germane to the subject of redistricting the state. The fact that some of the details were expressed in the title does not have the effect to prohibit the legislature from putting into the provisions of the act other details not named in the title, which were "germane to the subject, and adapted to the accomplishment of the object in view." The subject-matter of this act is entirely different, in all its bearings, from that mentioned in *State v. Bowers*, 14 Ind. 196, where the court held that the title limited the "application of the general subject to the particulars enumerated;" that "the specification in the title of the cases in which licenses are to be required entirely negatives the idea that the act itself extends beyond the cases enumerated;" and that the title "concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain," did not embrace concerts. The opinion in that case proceeds upon the theory that concerts were different exhibitions from any named in the title, and hence was not properly connected, in the sense meant by the constitution, with the subject of the licenses required in the cases specified in the title of the act. In that case there was no connection at all; here, all the provisions of the act are "properly connected" with the subject expressed in the title. The act has but one general object,—that of redistricting the state. All the matters embraced in the act are adapted to secure this object. The act, in this respect, does not violate the provisions of the constitution. *State v. Ah Sam*, 15 Nev. 32; *White v. City of Lincoln*, 5 Neb. 515; *People v. Mahaney*, 13 Mich. 495; *State v. County Judge*, 2 Iowa, 284; *Kurtz v. People*, 33 Mich. 282; *Morton v. Comptroller General*, 4 S. C. 445; *State v. Town of Union*, 33 N. J. Law, 354; *Montclair v. Ramsdell*, 107 U. S. 155; S. C. 2 Sup. Ct. Rep. 391.

3. Section 4 provides that "the district judges shall possess equal, co-extensive, and concurrent jurisdiction and power. They shall each have power to hold court in any county in this state. They shall each exercise and perform the powers, duties, and functions of the court, and of the judges thereof, and of judges at chambers. If the public business requires, each judge may try causes and transact judicial business in the same county, at the same time." This section does not, by any reasonable interpretation, "give to the judge at chambers all of the powers, duties, and functions of the organized judicial tribunal termed a 'court,'" as claimed by relator. It does not in any manner invest the judges at chambers with any other power or authority than is now possessed by the district judges under the provisions of the constitution. Having made one district, and provided for the election of three judges therein, it was necessary to insert this section so as to give the judges—as was given in the constitution to the three judges in Storey county—"co-extensive and concurrent

jurisdiction" throughout the entire state, and to make certain the point, which might otherwise be disputed, that, although there were three judges in one district, it only required one judge to constitute a court. The objections to this section urged by relator are hypercritical, and wholly untenable.

4. The provision in section 5, that "the district court shall always be open for the transaction of business," does not abolish the existing "non-judicial days." It was not intended to have any such effect, and should not be so construed. But even if such an interpretation could be given to it, it would furnish no legal reason for declaring the act void, as the legislature has the power to create or abolish non-judicial days.

5. There is no constitutional objection to the method provided in section 6 for the payment of the salaries of the district judges. This section provides for the payment of the judges' salaries quarterly "out of the county treasuries of the counties." The fact that the money is to be paid into the state treasury, and is to be, by the state treasurer, paid to the judges "in monthly installments," does not violate the provisions of section 15, art. 6, of the constitution.

6. The provisions of section 7, which, "in addition to the salary provided for," allows to the district judges "the necessary expenses actually paid by them for traveling by public conveyance in going to and from the place of holding court," should not, in our opinion, be construed as opposed to section 10, art. 6, of the constitution, prohibiting judicial officers from receiving to their own use "any fees or perquisites of office;" but admitting, for the sake of the argument, that it is susceptible of the construction claimed by relator, it would only affect "the payment of the traveling expenses" of the judges, and would not have the effect to destroy or render void the other provisions of the act. This clause is independent of and disconnected with the subject-matter of the other provisions of the act, and if it were unconstitutional, it would not destroy the other portions of the act. *Turner v. Fish*, 19 Nev. —, S. C. 9 Pac. Rep. 884, and authorities there cited.

7. The authority given to the judges by section 9, to "select one of their number for presiding judge," does not contravene any provision of the constitution. The judges, without this statutory provision, would have the inherent power to adopt such rules and regulations as might be necessary for the proper disposition of the judicial business to be transacted by them. They could have selected one of their number for presiding judge with the authority conferred by this section of the act, or could have determined, by lot or other means, which judge should, at any given time, visit certain counties of the state, and hold court therein. The legislature has declared in what particular manner this shall be determined, thereby obviating any contention which might otherwise arise as to the best method to be adopted in order to secure an equal or fair distribution of work.

8. The provision in section 9 that the courts shall be held in each county at least once in every six months, is a compliance with section 7, art. 6, of the constitution, which declares that "the times of holding the \* \* \* district courts shall be as fixed by law." The constitution does not require the law to specify when the terms of court shall be held. Its language is that "the terms of the district courts shall be held at the county-seats of their respective counties." The law providing for the election of three judges, as specified in the notice given by respondents, must stand.

The times of holding courts in the respective counties is not, perhaps, as clearly expressed as it might have been. It may be that some difficulty or inconvenience upon the part of litigants or attorneys may occur on that account. There may, also, be other provisions which it will be difficult to carry out to the entire satisfaction of the people of this state. Much will, in this respect, depend upon the character and ability of the judges who may be elected. But whatever difficulties may arise, if any, in the enforcement of this law, it will be within the power of the legislature to remedy the defects, if any are found. Our duty ends in determining, as we have, that there are no constitutional objections to this law.

Upon the merits, without reference to the time when the election notice is required to be given, the writ of *mandamus* is denied.

END OF VOLUME 10.









